

**UNILATERAL ECONOMIC SANCTIONS FOR
ENVIRONMENTAL PROTECTION:**

*The Application of the Pelly Sanctions by the United States against
Taiwan*

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UNIVERSITY OF EDINBURGH

ABSTRACT OF THESIS (Regulation 3.5.10)

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Title of Thesis **Unilateral Economic Sanctions for Environmental Protection:**

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Since World War II, unilateral economic sanctions, mainly in the form of trade embargoes, have been increasingly used to serve various purposes. Most of them have been imposed to seek changes of national policy on international security and human rights issues. The linkage of trade to the international environment, by contrast, is a relatively recent phenomenon. This dissertation is an analysis of the legality of such unilateral measures under international law.

One specific incident will serve as a detailed case study: the US's import ban against wildlife products of Taiwan authorised by the Pelly Amendment in 1994. This action constituted an unprecedented imposition of unilateral trade sanctions to pursue an environmental object, the preservation of endangered species. There will first be a discussion of the facts and background relevant to the case at the preliminary stage. The research will then assess the legality of this measure from several standpoints: third-State countermeasures, general rules of international law, international trade law, and international environmental law. This study will proceed to explore the legal implications of individual applicable law over the environmental trade sanctions. Finally, in each of these areas, the lawfulness of the Pelly sanctions will be assessed by applying the pertinent rules to the dispute.

The assessment of the Pelly sanctions against Taiwan leads to the following conclusions:

(1) It seems difficult to decide whether the Pelly sanctions were legal countermeasures, mainly because the uncertainty regarding the violation of customary law by Taiwan's conservative policy; (2) No definite rules have yet emerged to proscribe the use of economic sanctions in the context of general international law. Nevertheless, the study indicates that the use of Pelly sanctions, such as the case of Taiwan, is likely to constitute impermissible intervention; (3) Although the Pelly sanctions had not violated the US's obligations under the GATT/ WTO regime because of the non-member status of Taiwan, a hypothetical study shows that the sanctions, under the current WTO/GATT jurisprudence, probably would have been inconsistent with the GATT mandate if Taiwan had been a member; (4) In terms of the FCN treaty between the two countries, US could meet substantial difficulty in justifying the trade measure; (5) The linkage of the Pelly action with CITES's recommendation is clear. But, it remains uncertain whether the such connection may sufficiently warrant the international consensus required by Principle 12 of the Rio Declaration.

ABBREVIATIONS

<i>AIT</i>	<i>American Institute in Taiwan</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>Am. U. J. Int'l L. & Pol'y</i>	<i>American University Journal of International Law and Policy</i>
<i>ASIL Ann. Proc.</i>	<i>Annual Proceedings of American Society of International Law</i>
<i>B. U. Int'l L. J.</i>	<i>Boston University International Law Journal</i>
<i>BYIL</i>	<i>British Yearbook of International Law</i>
<i>Case West. Res. J. Int'l L.</i>	<i>Case Western Reserve Journal of International Law</i>
<i>CCNAA</i>	<i>Coordination Council for North American Affairs</i>
<i>CITES</i>	<i>Convention on International Trade in Endangered Species</i>
<i>CJEC</i>	<i>Court of Justice of the European Community</i>
<i>Colo. J. Int'l Env't'l L. & Pol'y</i>	<i>Colorado Journal of International Environmental Law and Policy</i>
<i>COP</i>	<i>Conference of the Parties</i>
<i>Corn. Int'l L. J.</i>	<i>Cornell International Law Journal</i>
<i>CYILA</i>	<i>Chinese Yearbook of International Law and Affairs</i>
<i>Den. J. Int'l L. Poli.</i>	<i>Denver Journal of International Law and Politics</i>
<i>DPCIA</i>	<i>Dolphin Protection Consumer Information Act</i>
<i>EEC</i>	<i>European Economic Community</i>
<i>EEZ</i>	<i>Exclusive Economic Zone</i>
<i>EIA</i>	<i>Environmental Investigation Agency</i>
<i>EII</i>	<i>Earth Island Institute</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>ELQ</i>	<i>Ecology Law Quarterly</i>
<i>Env't'l L.</i>	<i>Environmental Law</i>
<i>EPL</i>	<i>Environmental Policy and Law</i>
<i>ETP</i>	<i>Eastern Tropical Pacific Ocean</i>
<i>FCN</i>	<i>Friendship, Commerce and Navigation Treaty</i>
<i>GA Res.</i>	<i>General Assembly Resolutions</i>
<i>GATT</i>	<i>General Agreement on Tariffs and Trade</i>
<i>Geo. Int'l Env't'l L. Rev.</i>	<i>Georgetown International Environmental Law Review</i>
<i>Geo. J. Int'l & Comp. L.</i>	<i>Georgia Journal of International and Comparative</i>

	<i>Law</i>
<i>Geo. L. Rev.</i>	<i>Georgia Law Review</i>
<i>GYIL</i>	<i>German Yearbook of International Law</i>
<i>Har. Envt'l L. Rev.</i>	<i>Harvard Environmental Law Review</i>
<i>Hous. J. Int'l L.</i>	<i>Houston Journal of International Law</i>
<i>IATTC</i>	<i>Inter-American Tropical Tuna Commission</i>
<i>ICJ</i>	<i>International Court of Justice</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>ICNAF</i>	<i>International Commission for the Northwest Atlantic Fisheries</i>
<i>ICRW</i>	<i>International Convention for the Regulation of Whaling</i>
<i>Int'l Lawyer</i>	<i>International Lawyer</i>
<i>ILC</i>	<i>International Law Commission</i>
<i>ILM</i>	<i>International Legal Material</i>
<i>Indian J. Int'l L.</i>	<i>Indian Journal of International Law</i>
<i>IUCN</i>	<i>International Union for the Conservation of Nature</i>
<i>IWC</i>	<i>International Whaling Commission</i>
<i>J. Envt'l L.</i>	<i>Journal of Environmental Law</i>
<i>J. Int'l L. & Ecoms.</i>	<i>Journal of International Law and Economics</i>
<i>J. World Trade</i>	<i>Journal of World Trade</i>
<i>MEAs</i>	<i>Multilateral Environmental Agreements</i>
<i>MFN</i>	<i>Most-Favoured-Nation</i>
<i>Mich. J. Int'l L.</i>	<i>Michigan Journal of International Law</i>
<i>MMPA</i>	<i>Marine Mammal Protection Act</i>
<i>Nat. Res. J.</i>	<i>Natural Resources Journal</i>
<i>NGO</i>	<i>Non-governmental Organization</i>
<i>NYU Int'l L. & Pol'y</i>	<i>New York University Journal of International Law and Policy</i>
<i>OAS</i>	<i>Organization of American States</i>
<i>OECD</i>	<i>Organization for Economic Co-operation and Development</i>
<i>Paci. R. L. & Pol'y J.</i>	<i>Pacific Rim Law and Policy Journal</i>
<i>PCIJ</i>	<i>Permanent Court of International Justice</i>
<i>PPM</i>	<i>Process and Production Method</i>
<i>Stan. Envt'l L. J.</i>	<i>Stanford Environmental Law Journal</i>
<i>Stan. J. Int'l L.</i>	<i>Stanford Journal of International Law</i>
<i>TEDs</i>	<i>Turtle Escape Devices</i>

<i>Tex. Int'l L. J.</i>	<i>Texas International Law Journal</i>
<i>TRA</i>	<i>Taiwan Relations Act</i>
<i>TRAFFIC</i>	<i>Trade Records Analysis of Fauna and Flora in Commerce</i>
<i>UN</i>	<i>United Nations</i>
<i>UNCED</i>	<i>United Nations Conference on Environment and Development</i>
<i>UNCLOS</i>	<i>United Nations Convention on the Law of the Sea</i>
<i>UNCTAD</i>	<i>United Nations Conference on Trade and Development</i>
<i>UNEP</i>	<i>United Nations Environment Programme</i>
<i>UNESCO</i>	<i>United Nations Educational, Scientific, Cultural Organization</i>
<i>UNFCCC</i>	<i>United Nations Framework Convention on Climate Change</i>
<i>UNGA</i>	<i>United Nations General Assembly</i>
<i>UNRIAA</i>	<i>United Nations Reports of International Arbitral Awards</i>
<i>UNTS</i>	<i>United Nations Treaty Series</i>
<i>U. Penn. L. J.</i>	<i>University of Pennsylvania Law Journal</i>
<i>Va. J. Int'l L.</i>	<i>Virginia Journal of International Law</i>
<i>Van. J. Transnat'l L.</i>	<i>Vanderbilt Journal of Transnational Law</i>
<i>Wash. & Lee L. Rev.</i>	<i>Washington and Lee Law Review</i>
<i>WCED</i>	<i>World Commission on Environment and Development</i>
<i>WCL</i>	<i>Wildlife Conservation Law</i>
<i>WTO</i>	<i>World Trade Organization</i>
<i>Yale J. Int'l L.</i>	<i>Yale Journal of International law</i>
<i>Yb. Int'l Envt'l L.</i>	<i>Yearbook of International Environmental Law</i>
<i>Yb. ILC</i>	<i>Yearbook of the International Law Commission</i>

Introduction

"He who, using force, makes a pretence to benevolence in the leader of the princes. A leader of the princes requires a large kingdom. He who, using virtue, practises benevolence is the sovereign of the kingdom. To become the sovereign of the kingdom, a prince need not wait for a large kingdom"

Mencius

With the advance of technology and the development of commerce and trade, it has been increasingly recognised that injuring another country's economy is a means of exerting pressure upon it.¹ When resort to war was justified to settle international disputes, blockade was the most radical method of economic sanctions, aiming at the interruption of the flow by sea of vital goods to enemy.² In the two World Wars, the Allied blockades of Germany were undoubtedly instrumental in weakening the nation's fighting capacity, and contributed to her eventual defeat.³ Even without engaging in warfare against target nations, strong countries' deployment of so called "pacific blockades" has proved to be an effective coercion.⁴ The most noted case was the action exercised by Britain, Germany and Italy to force Venezuela to pay its debts in 1902.⁵

The original belligerent role of economic sanctions in serving as a supplemental tool to achieve the end of war has diminished. Instead, it has evolved into a relatively independent regime within contemporary international society. Following the two World Wars, the authorised enforcement system created in the League of Nations and the United Nations (UN) has provided the basis for the collective operation of international sanctions, primarily relying on economic measures to enforce compliance with international standards.⁶ On the other hand, the emergence of

¹ See Doxey, *Economic Sanctions*, at 10, 11.

² Before economic blockade incurred in the last two world wars in twentieth century, evidence shows that States' inclination to deploy blockade had been prominent. The pre-World War I episodes of economic sanctions for foreign policy goals see Hufbauer and Schott, *Economic Sanctions*, at 28-31.

³ Doxey, *Economic sanctions*, at 11-14.

⁴ See Starke, *Introduction to International Law*, at 523-24.

⁵ See Oppenheim, *International Law*, Vol II, at 146, n. 1. Cf One author contends that the blockade against Venezuela was almost certainly a war blockade. See Brownlie, *Use of Force*, at 35-6, 39.

⁶ Art. 41, the Charter of the United Nations, signed at San Francisco 26 June 1945; entered into force 24 Oct. 1945 [hereinafter UN Charter].

superpowers with mighty economic weapons heralds the frequent demonstration of economic measures on a unilateral basis. Their power to influence the policy of other countries would seem hard to counter. According to Hufbauer and Schott, among the 116 cases of economic sanctions documented from World War I to 1990, the United States, either alone or in concert with its allies, has deployed sanctions 77 times; the United Kingdom 22 times, often in co-operation with the League of Nations and later the United Nations; the former Soviet Union used them 10 times, usually against recalcitrant satellites.⁷

Several factors favour the use of economic sanctions. First of all, the justification of a military action against States has become relatively unattainable under modern public international law. Considering the irreversible damage and human cost incurred under two World Wars, international society has been committed to resolving international conflicts through the mechanism of a collective security regime undertaken by the Security Council within the UN, instead of allowing its members to invoke the use of force.⁸ Accordingly, member States are prohibited from using force to settle disputes, except in case of self-defence, or when authorised by the Security Council.⁹ In contrast, countries imposing economic sanctions, the non-violent measures, generally face less of a challenge from the international executive or judicial arena.¹⁰

Secondly, while the global economy marches toward integration, greater international trade will contribute to national development and interests. It is indisputable that absolute self-sufficiency is becoming ever less feasible, and any forms of interruption of business transactions will certainly cause economic loss to a country. Therefore, countries are increasingly convinced that the use of economic

⁷ Hufbauer and Schott, *Economic Sanctions*, at 8, 9.

⁸ According to Art. 24 of the UN Charter, the Security Council is conferred the primary responsibility for the maintenance of international peace and security. To fulfil these duties, some specific powers also are granted to the organ. See the chapters VI, VII and VIII of the Charter.

⁹ See UN Charter, Art. 2(4) and the context in the Chapter VII.

¹⁰ Among the hundreds of economic sanctions imposed since the World War I, the complaint presented by Nicaragua against the United States's economic coercion before the World Court in 1986 seemed to be the first case judged concerning the legality of the use of economic sanctions under the customary international law. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.A.)*, ICJ Rep. 1986, at 14, 126 [hereinafter *Nicaragua Case*]. The powerful States' veto privilege accorded by the UN Charter used to deter the enforcement of the ICJ's judgement probably would frustrate countries under sanctions to resort the dispute to the international tribunals. See UN Charter, Art. 94 (2) and 27 (3).

weapons, less costly than war, could be more effective and therefore preferable, particularly when diverse economic means designed to pressurise the target to conform to certain standards are available.¹¹ That is the reason why Hufbauer and Schott concluded that: "A diplomatic slap on the wrist may not hit where it hurts, but more extreme measures, such as covert action or military measures, may be excessive. Sanctions provide a popular middle road: they add teeth to international diplomacy, even when the bark is worse than the bite."¹²

For the purpose of this thesis, the term, "economic sanctions", or "economic coercion" means any economic measures of a coercive nature, taken unilaterally against an alleged violator in order to enforce compliance with international norms. In practice, similar terms, such as "boycott"¹³, "embargoes"¹⁴ or "countermeasures"¹⁵ have often been employed to describe the exercise of economic sanctions.

The term "sanctions", in its general meaning, refers to a penalty inflicted upon a State for disobeying a law or rule.¹⁶ In accordance with this definition, not surprisingly, some international lawyers argue that economic measures not designed to punish a violation of international law should not be classified as sanctions.¹⁷ Accordingly, some foreign practices might be excluded from the pool of economic sanctions. For instance, western strategic embargoes against the former Soviet Union and the Arab League boycotts of Israel and its allies and trading partners perhaps would not constitute sanctions. Therefore, some authors prefer the term "economic coercion" to "economic sanctions" in depicting this kind of action.¹⁸ On the other

¹¹ See Doxey, *Economic Sanctions*, at 10,11; Doxey, *International Sanctions*, at 8, 9; Hufbauer and Schott, *Economic Sanctions*, at 11, 13.

¹² Hufbauer and Schott, *id.* at 11. See also Carter, *Economic Sanctions*, at 12.

¹³ The boycott originally refers to a refusal to buy particular goods from a target country. The study focuses on the boycott taken by the State authority. The boycott initiated by consumers unofficially is not covered by the study.

¹⁴ The embargoes usually involve the control of imports from or export to the target State.

¹⁵ Countermeasures refer to an action taken by an injured State in response to a prior unlawful offence. Subject to certain limitation, the action could be justified under international law. See chapter two of the thesis.

¹⁶ See *The Concise Oxford Dictionary of Current English*, at 1221. The traditional implication of sanctions has similar function of criminal law—to punish, to deter, and to rehabilitate. See Hufbauer and Schott, *Economic Sanctions*, at 11.

¹⁷ See Doxey, *Economic Sanctions*, at 4, 5.

¹⁸ See Boorman III, "Economic Coercion", at 205-31; Bowett, "Economic Coercion", at 1-12; Farer, "Political and Economic Coercion", at 405-13.; Lillich, "Economic Coercion", at 233-44; Partridge,

hand, Schermers and Blokker distinguish between sanctions against individuals and sanctions against an entity such as a State. In effect, the latter, they argue, "[are] not meant to be *punitive* in the sense that 'crime should be revenged'."¹⁹ Rather, "Their only purpose is to exert sufficient pressure to induce addressees not to violate the rules in the future (the preventive function), or to stop current violations (the repressive function)."²⁰

Regardless of the lack of uniformity in the term's usage, for the purpose of this research, the emphasis will be placed primarily on the study of the intent of senders and the character of measures unilaterally imposed in an attempt to assess the legality of the actions, rather than on whether or not the target's behaviour deserves the imposition of sanctions. In fact, some practices indicate that sanctions are often imposed against countries that are not necessarily engaged in activities which contravene international law. In this regard, the research would not agree that the employment of the term "sanctions" by States to describe economic measures necessarily implies a genuine violation of international law by the target.²¹

Countries imposing the sanctions are referred as the "acting State" or "senders", and nations under the sanctions are usually termed the "target" or "victim States". Regarding the content of the sanctions, the economic means generally encompass two primary types of sanctions: trade interruption; and financial impediment.²² The former mainly focuses on export control and import restriction. The latter involves the withdrawal of official economic and technical assistance, especially, to developing countries, and may extend to a freeze of foreign assets owned by the target country in the sender country.

Although economic measures have frequently been used since the Second World War to seek changes of national behaviour regarding the international security, human rights, and other foreign policy issues,²³ the use of trade embargoes in an environmental context is quite a modern development. As the preservation of the global environment becomes increasingly significant, the use of trade restrictions has been taken as a tool to promote environment awareness, featuring a relatively new pattern of transboundary influence. For instance, in response to the depletion of

"Political and Economic Coercion", at 755-69.

¹⁹ Schermers and Blokker, *International Institution*, at 902 [emphasis added].

²⁰ *Id.*

²¹ See Doxey, *Economic Sanctions*, at 6, 7.

²² The detail content of these two catalogues is illustrated in Doxey's work. See Doxey, *id.* at 11, 12.

²³ Hufbauer and Schott, *Economic Sanctions*, at 4, 28.

world natural resources, over the past two decades, a number of US statutes have been enacted to mandate trade embargoes against foreign nations' conservation practices, especially for fisheries and marine species.²⁴ The imposition of trade restrictions, however, has not been common until recently.²⁵ Several authors attempt to justify unilateral trade sanctions for environmental purposes largely on the basis of their effectiveness in implementing international standards. It is argued that the measure can be used to force a non-party State to become party to international agreements. Also, it may put pressure on parties to observe the standards prescribed by the environmental regimes.²⁶ It has been observed, in contrast, that "an unbridled unilateralism would reduce international trade to a power-based regime that would have no stability or rationality."²⁷

Some of the statutes are designed purely to enforce US national standards. For instance, the amendment to the Marine Mammal Protective Act (MMPA) in 1988 forbids the importation of tuna from countries which fail to comply with the US regulatory programme on incidental dolphin taking.²⁸ As a result, several tuna exporting countries have suffered trade embargoes.²⁹ In addition, other legislation with lofty ambition seeks to enforce international conservation agreements.³⁰

The focus of the present discussion is the Pelly Amendment to the Fishermen's Protective Act,³¹ enacted by the US in 1971. It authorises an import ban to advance compliance with international environmental standards on fisheries and endangered species. In 1994, triggered by Taiwan's insufficient progress in halting illegal trade in tiger and rhinoceros parts, the Clinton Administration invoked the Pelly Amendment, prohibiting the importation of certain wildlife products from Taiwan. The implementation of the Pelly trade embargo against Taiwan highlighted an unprecedented imposition of unilateral trade sanctions in the pursuit of international environmental objectives.³² The sanctions were also the first-ever imposed under the

²⁴ See generally McDorman, "Fish Embargo", at 477-507; McLaughlin, "Trade Sanctions", at 7-8, 20-25

²⁵ See McLaughlin, *id.* at 8.

²⁶ See Weiss, "Trade and Environment", at 732. Southworth III, "GATT and the Environment", at 1011.

²⁷ Schoenbaum, "Trade and Environment", at 723.

²⁸ 16 U.S.C. 1371 (a) (2) (B) (1988).

²⁹ McDorman, "Fish Embargo", at 494-95.

³⁰ The statutes see McLaughlin, "Trade Sanctions", at 17-19.

³¹ 22 U.S.C. 1978.

³² Friedman, "US Puts Sanctions on Taiwan, N. Y. Times," 4 Apr. 1994, at D1. Press release from the White House, President Lifts Trade Sanctions against Taiwan: Welcomes Major Steps Taken to Protect

statute since its enactment, although the US has regularly threatened to employ the measure in the past few decades.³³ For example, in response to the whaling practice conducted by Japan, the US President Reagan denied fishing privileges to Japan in the US exclusive economic zone under the Packwood-Magnuson Amendment.³⁴ This action also constituted, according to the Amendment, a certification under the Pelly Amendment (i.e. a statement that Japan could potentially be exposed to a trade embargo in addition to the denial of fishing rights).³⁵ In the event, however, Pelly sanctions were not actually implemented against Japan.³⁶

This environment-oriented measure aroused different reactions and remained controversial. Environmentalists, generally speaking, approved of the enforcement measures. The Earth Island Institute (EII) praised the sanctions as "perhaps the most significant event for species protection to occur in 20 years."³⁷ Diana McMeekin, head of the African Wildlife Foundation said "[t]he US has taken the lead in this worldwide battle to save the rhinoceros and tiger before it is too late. It is as if the government has issued a last-minute stay of execution for those magnificent creatures on the edge of extinction."³⁸ The environmental sanctions, by contrast, drew harsh criticism from others who argued the "use of American economic might to impose our environmental values on Taiwan's culture . . . tantamount to "eco-imperialism."³⁹ Taiwan's eventual submission to the pressure of US to some extent echoed the conviction that the use of trade sanctions can be an effective measure in the protection of the environment. Nevertheless, it should be noted that a fruitful result brought by the measure does not necessarily ensure the consistency of the action with

Endangered Species (30 June 1995)[hereinafter President lifts sanctions].

³³ Prior to sanctioning Taiwan, the US has threatened to impose the Pelly sanctions for fourteen times. See Appendix B, Table 1. The brief history of the Pelly episodes before 1994 see Charnovitz, "Pelly Amendment", at 763-72.

³⁴ 16 U.S.C. 1821(e)(2)(1985).

³⁵ 16 U.S.C. 1821(e)(2)(A)(i) (1985).

³⁶ See Charnovitz, *id.* at 761,765.

³⁷ Gerstenzang, "US Will Impose Trade Sanctions Against Taiwan to Protect Wildlife," L.A. Times, 12 Apr. 1994, at A7.

³⁸ Friedman, "US Puts Sanctions On Taiwan", N. Y. Times, 12 Apr. 1994, at D1.

³⁹ J. Sheehan, "Most Favored Fauna Treatment," Wash. Times, 31 May 1994, at A12. The term eco-imperialism refers to the situation that powerful and wealthy countries will impose their own views regarding environment or other social or welfare standards on other parts of the world. See Jackson, "World Trade", at 1241. See also DeVries, "Eco-Imperialism", J. Com., 30 Apr. 1992, at 8A; Charnovitz, "Free Trade", at 492-93. Esty, *Greening GATT*, at 185-88.

international law.

The sanctions imposed by the US against Taiwan provide an excellent opportunity to conduct an assessment on its legality under international law, notwithstanding the fact that no legal claim was made by Taiwan against the US. As the US has continued to threaten a number of countries by invoking the Pelly Amendment,⁴⁰ the likelihood is that similar sanctions will be imposed in the future. Also, it is quite feasible that the target country may wish to refer the dispute to an international tribunal. The necessity of exploring the legality of the action thus remains. Further, the analysis of the applicable regimes may contribute to the understanding of how modern international law deals with unilateral environmental sanctions so as to assist some relevant research regarding the general topic.

To date, the legality of Pelly type trade sanctions under modern international law has not been challenged in international tribunals, although some useful references have been made in recent disputes, especially in the trade regime.⁴¹ The WTO/GATT system, however, has not yet addressed the use of trade sanctions in the advancement of international environmental standards. Economic sanctions were considered by the International Court of Justice (ICJ) in the *Nicaragua* case. However, in this case, they were not launched for environmental purposes. The lawfulness of unilateral environmental sanctions, therefore, has not yet been adequately and comprehensively analysed under international law. In this research, I hope to contribute to the clarification of this problem.

The principal objective of the thesis is to explore the legality of environmentally-motivated unilateral sanctions through a consideration of the US Pelly sanctions under international law. Surely, the case represents the only example of use of the Pelly sanctions since its enactment, although a number of countries have been under the threat of the sanctions (see Appendix B). The author senses the limitations of the discussion partly due to the unique status of Taiwan.⁴² But, the status of the target

⁴⁰ For instance, in 1995, Japan was certified for its whaling policy. Both Canada and Norway were certified for their whaling practices in 1996. None of these certifications so far has led to an imposition of a Pelly trade sanction.

⁴¹ For instance, the most similar and noted events have been the *Tuna/Dolphin* dispute between the US and Mexico in 1991, as well as an analogous case between the US and several European countries in 1994, all relating to the process and production method (PPM). Also, the 1998 *Shrimp/Turtle* case featured the most recent use of the environmental trade measures.

⁴² Because of the political reason, Taiwan is not allowed to accede to most environmental treaties. See chapter two of the thesis. Also, currently, the country is not a member of the World Trade Organisation (WTO).

nations is merely one of the factors affecting the assessment. In sum, it is believed that the study may contribute to the clarification on the legitimacy of such action, irrespective of which country is being sanctioned, by exploring the legal implications of applicable law regarding the sanctions and simulating possible arguments raised by the disputant parties.

It should be noted that it is beyond the scope of this thesis to cope with procedural matters, such as which tribunal or whether a specific dispute settlement body is institutionally appropriate in dealing with the issue.⁴³

Before making any judgement, one needs to understand how the dispute between Taiwan and the US arose. Part One (*i.e.* Chapter 1) relates the history of the dispute between Taiwan and the US, leading to the Pelly Amendment sanctions. It will first address the background under which the Pelly sanctions were imposed, featuring the international environmental problem of conserving endangered rhinos and tiger and the response of the international competent regime of the Convention on International Trade in Endangered Species (CITES)⁴⁴ as well. The chapter, then, explains the application of the sanctions against Taiwan. It will examine the origin and legislation of the US Pelly Amendment which provides the material and procedural basis for directing the implementation of the enforcement measure. Subsequently, the episode of the sanctions will be analysed, from their initial imposition to their cessation.

Part Two explores what general substantive international norms may be applicable to the governance of the use of unilateral economic embargoes for specific purposes. Chapter Two will turn to a remedial issue: law of countermeasures. It has been recognised that, under certain circumstances, an individual State is permitted to enforce compliance with international law without having to show a material injury. Thus, it is interesting to discuss whether the sanctions imposed by the US, which suffered no direct damage, may be justified under the regime of countermeasures. The draft articles on State responsibility formulated by the International Law Commission (ILC) provide some provisions relevant to the assessment. Chapter Two will first address the current rule regarding countermeasures taken by third-state party. It mainly attempts to analyse the circumstances entailing a State to impose countermeasures, even where they are not directly injured by the offence. In order to

⁴³ Some authors question whether a GATT/WTO dispute settlement regime is a adequate forum in dealing with the dispute arising from the use of environmental trade measures. *See generally* Houseman and Zaelke, "Trade and Environmental Policies", at 568-69.

⁴⁴ The Convention on International Trade in Endangered Species in Fauna and Flora, 3 Mar. 1973, in force 1 July 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243.

determine whether the Pelly sanctions were a justified environmental countermeasure, it is essential first to examine whether Taiwan had violated international law in relation to the protection of endangered species, followed by an analysis as to whether the rule of protecting species can be enforceable by any State.

Chapter Three will analyse three categories of norms of general international law that may constrain the sovereign use of economic measures so as to support Taiwan's claim against the US sanctions: use of force, non-intervention, and abuse of rights. After examining the applicability of respective norms to the dispute, the chapter continues to determine whether the trade embargoes against Taiwan were in violation of any of these rules. The analysis in this area will necessarily be highly concerned with the specific facts of the Taiwan situation, particularly in the sphere of non-intervention.

✓✓ Part Three analyses the consistency of the Pelly sanctions with special regimes, particularly those concerning trade and environmental agreements. Chapter Four explores the legality of the Pelly sanctions under the multilateral and bilateral trade regimes the World Trade Organisation (WTO)⁴⁵/General Agreement on Tariff and Trade (GATT) 1994⁴⁶ and the Friendship, Commerce and Navigation Treaty (FCN). { As to the former, it seeks to examine how the WTO/GATT has dealt with the trade measures for environmental purpose in the past decade, then discusses the consistency of the Pelly-type sanctions with the WTO jurisprudence. Given Taiwan's non-membership of the WTO, the trade sanctions essentially violated no US obligation under GATT 1994. Nevertheless, other WTO members that could be targets of the Pelly Amendment sanctions would have been entitled to resort the dispute to the WTO dispute settlement mechanism. Therefore, for the sake of completeness, the analysis of the US action against Taiwan as a "hypothetical" WTO case will be presented. The application of the WTO norms to the US action against Taiwan will be discussed.

Chapter Four will then deal with FCN treaties. The Republic of China (Taiwan)⁴⁷ is one of the countries with which the US concluded a FCN treaty⁴⁸ after

⁴⁵ The WTO was created according to the Marrakesh Agreement in 1st January of 1995, succeeding the General Agreement on Tariff and Trade (GATT).

⁴⁶ GATT 1994 was adopted at the Marrakesh Conference, incorporating the original 1947 GATT with certain amendment. See *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*.

⁴⁷ The terms, the Republic of China and Taiwan are interchangeable in this thesis.

⁴⁸ Treaty of Friendship, Commerce and Navigation between the US and the Republic of China (ROC), 63 U.S.T. 1299, TIAS 1871, signed at Nanking in 4 Nov. 1946; entered into force in 30 Nov. 1948.

World War II. The treaty was principally concluded to regulate bilateral commercial intercourse. It accords both parties most-favoured-nation status with regard to imports and exports, access to ports, and generally guarantees freedom of commerce and navigation between these two countries. In particular, like the rules of GATT, the treaty includes several provisions by which certain trade measures may be justified. The chapter will determine whether the Pelly trade restrictions against Taiwan were in breach of US's obligation under the bilateral commercial agreement.

Chapter Five explores the consistency of unilateral environmental sanctions with international environmental law. Ostensibly, there seems no conflict between the regime and unilateral environmental enforcement actions. Yet, in fact, some special constraints by international environmental law have been imposed on the unilateral measures, mainly referring to Principle 12 of the Rio Declaration on Environment and Development.⁴⁹ The principle addresses the interrelationship between trade and environment, apparently favouring collective efforts rather than unilateral actions to the extent that it discourages States from employing unilateral measures to deal with international environmental issues. As the principle, even in the form of soft-law, has already been hardened by the relevant decisions of international tribunals, it is interesting to examine the consistency of the Pelly sanctions against Taiwan with the mandate embodied in the principle.

At the end, general conclusions will be offered.

⁴⁹ Adopted 14 June 1992, at the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF. 151/5Rev.1.

**PART ONE: THE DISPUTE BETWEEN TAIWAN AND
THE US ARISING FROM THE PELLY SANCTIONS**

Chapter 1

The Imposition of the Pelly Sanctions against Taiwan

Prior to assessing the legality of the Pelly environmental sanctions against Taiwan under respective international regimes and applicable norms, it is imperative to set out the background under which the sanctions were imposed. The first section of chapter one examines the issue of the preservation of endangered species: rhinos and tigers, and the response of the international competent regime, mainly the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹

The chapter in the second section first seeks to study the legislation of the Pelly Amendment so as to locate the function and operation of the US conservation statute, which authorises the US president to implement the trade ban against offending nations. The whole episode of the Pelly sanctions upon Taiwan will then be reviewed chronologically, starting from the decision to invoke the unilateral sanctions against Taiwan to the eventual lifting of the trade embargo.

A The background

1 The problem: conservation of tigers and rhinoceros

Since the late 1980s, the saving of species of rhinoceros and tiger from extinction has become an increasingly urgent issue of global wildlife protection, due to their drastic decline in populations.² In 1994, it was estimated that the numbers of rhinoceroses had declined 90% over the previous 23 years to around 10,000,³ and the tiger population had reduced 95% in this century to present levels of 5,000.⁴ Not

¹ The Convention on International Trade in Endangered Species in Fauna and Flora, 3 Mar. 1973, in force 1 July 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243.

² See e.g. US President's Message to Congress on Rhinoceros and Tiger Trade by China and Taiwan (Nov. 8, 1993)[hereinafter 1993 President's message to Congress]; Linden, "Tigers on the Brink", at 51.

³ There are five species of rhinoceros: the African Black, the African White, the Javan, the Sumatran, and the Great One-Horned Rhinoceros. The surveyed number of respective species see CITES Secretariat Report, Trade in Rhinoceros specimens, Proceedings of the Ninth Meeting of the Conference of the Parties, at 1, UN/CITES Doc. 9.28 (7-18 Nov. 1994) [hereinafter 1994 CITES Secretariat Report].

⁴ While there were once eight species of tiger, presently only five of them are remaining, which include: the Siberian Tiger for 150-200; the South China Tiger with less than 50 remaining; the Indian or Bengal Tiger with approximately 4,500; the Indo-Chinese Tiger with 800-1200; and the Sumatran Tiger with up to 400 remaining. See The Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC) (USA), TIGER TRADE I (Mar. 1994).

surprisingly, there was a alarm that "unless something dramatic is done to reverse the trend, tigers will be seen only in captivity, prowling in zoos or performing in circuses."⁵

Environmentalists believed that habitat loss resulting from the expansion of human activities and illegal poaching threatened the survival of these endangered species.⁶ In particular, they claimed that illegal hunting, driven by the market demand for their medicinal use, had played a decisive role in causing the rapid decline of both species.⁷ Furthermore, it had been predicted that these endangered populations would become extinct within two to five years, unless the trade in their body parts was immediately eradicated.⁸ They were convinced that strict control on the trade in the species would be a necessary and effective method of reducing the incentive for poaching. Encouraged by the previous experience that the persistent suppression of the demand for animal parts could effectively halt the decline of threatened species,⁹ environmental groups in the early 1990s therefore began an intense international campaign against those countries who continued to allow people to use tiger and rhino parts. Apart from condemning countries for tolerating their nationals' exploitation of those species, the organisations made complaints to the international wildlife regime, CITES¹⁰ and some countries, notably the US,¹¹ urging that coercive measures be imposed against the consumer countries. Curiously, in contrast to the consumer countries, the nations where these species inhabit received relatively minor censure regarding their failure to conserve the animals, stop the poaching, and prohibit exports of these wildlife products, all of which equally hampered the international effort for rhinos and tiger conservation.¹²

⁵ Linden, "Tigers on the Brink", at 52.

⁶ (TRAFFIC) (USA), TIGERS TRADE 1 (Mar. 1994), at 1. *See also* Vulpio, "Rhinos and Tigers", at 472.

⁷ *See* Patel, "Endangered Species", at 193, 200; Cheung, "Tiger and Rhinoceros", at 131-35. *See also* 1993 President's message to Congress.

⁸ *See* 1993 President's Message to Congress.

⁹ It was argued that, "Pressure on the fashion industry in the West helped halt precipitous declines in spotted-cat populations during the 1970s, and international condemnation of ivory-consuming nations has granted the elephant at least a temporary reprieve." Linden, "Tigers on the Brink", at 53.

¹⁰ Eighty-Six environmental groups led by the Earth Island Institute (EII) and Britain's Tiger Trust appealed strongly against China and Taiwan to the meeting of the Standing Committee of CITES held in Mar. 1993. *See* Linden, "Tigers on the Brink", at 55.

¹¹ In November 1992, some environmental groups petitioned the US Department of Interior, Fish and Wildlife Service to invoke the Pelly Amendment actions against China, Taiwan, South Korea and Yemen. *See* Administration Moves to Halt International Trade in Tiger and Rhino Parts, Department of the Interior News Release, 9 June 1993.

¹² Take tigers for example, environmental groups seek to cooperate with nations, like India and Russia where the species dwell *rather than exert pressure on their governments* [emphasis added]. *See* Patel,

It was evident that the demand for tiger or rhino parts for medical purposes or consumption primarily originated from Asian nations, such as China, Hong Kong, South Korea and Taiwan.¹³ Using the animal's parts for medicinal practice has long been rooted in Chinese culture, and accordingly has influenced the custom of other Asian countries.¹⁴ For Chinese society, the rhino horn has been used as an effective medicine in blood-cooling, fever-reducing and detoxification for thousands of years.¹⁵ It is appraised as a "magic remedy and a precious heritage left over by ancestors from the treasure house of traditional Chinese medicine."¹⁶ In addition, despite a lack of scientific evidence,¹⁷ Asian people have never doubted the benefits of tiger specimens, especially tiger bones, to human health for their effect in relieving a variety of ailments, such as rheumatic pain, sexual dysfunction and other physical and mental complaints.¹⁸ From their perspective, consumption of animal parts simply is a normal exploitation of natural resources rather than punishable conduct. Moreover, their domestic medical sectors even feared that the traditional culture of medicine is likely to vanish with the absolute ban on the use of those animals' remains.¹⁹ While certain alternative remedies have been developing,²⁰ apparently, much effort needs to be made to persuade people to change such customs. It should be noted that, given the powerful cultural tradition underling this usage, adjustment of the custom to a degree that may meet prevailing standards of international conservation is unlikely to be achieved in the short term. The long-term solution, it is suggested, cannot rely on external coercive measures, such as trade sanctions. Instead, international cooperation and education²¹ that normally take into account cultural differences are better to address the issue more effectively.

Another critical factor that may affect the degree of success in eradicating the alleged illicit commercial conduct is the attitude of the majority of Asian officials

"Endangered Species", at 196-97.

¹³ Linden, "Tigers on the Brink", at 54; Cheung, "Tiger and Rhinoceros", at 136. *See also* Judy Mills, *Market under Cover: The Rhinoceros Horn Trade in South Korea*, TRAFFIC Network Report 1 (1993) (TRAFFIC Int'l, Cambridge, UK).

¹⁴ Cheung, "Tiger and Rhinoceros", at 131.

¹⁵ Wang, "Implementation of CITES", at 208. *See also* 1994 CITES Secretariat Report.

¹⁶ Wang, *id.*

¹⁷ *See* Burns, "Medicinal Potions May Doom Tiger to Extinction," N.Y. Time, 15 Mar. 1994, at C 2.

¹⁸ Wang, "Implementation of CITES", at 207.

¹⁹ *See id.* at 207-8.

²⁰ *See id.* at 207; The World Wildlife Fund (WWF), a NGO, has committed itself to working with the Asian people and their governments for the purpose of introducing alternative medicines. *See* Patel, "Endangered Species", at 209.

²¹ Public education is a powerful mechanism that may help reduce the demand for the animals' parts.

towards the trade in these species. Unlike the smuggling of drugs and weapons, which undoubtedly draws universal condemnation, the use of animal parts, in their view, should not amount to a crime.²² This is, probably, the primary reason for their hesitance in tightening the enforcement of halting the trade of tiger and rhino parts. Moreover, faced with the growing intensity of the international campaign against utilisation of the animals' parts, Asian officials tended to resist an external pressure that paid scant regard to cultural differences.²³ They even regarded the pressure simply as motivated by the desire to impose western environmental values on Asian countries in a form of imperialism.²⁴

Indeed, conservation of endangered species requires global effort: it cannot be effectively achieved without cooperation from all relevant countries, whether producer or consumer states. Although market demand from Asia constituted a direct force leading to the decrease of rhinos and tiger numbers, those consumer nations should not be blamed solely for the near extinction of the species. Quoting the words of Geoffrey Ward, author of *The Tiger-Wallahs*: "Poaching is murder, but crowding is slow strangulation.", Linden thus correctly observed that "Even if international pressure eliminated poaching, the tiger would still be in trouble. Its habitat is shrinking, and its food supply is dwindling as the territory claimed by humans inexorably expands."²⁵

2 Response of the competent international institution: CITES

In spite of several structural shortcomings,²⁶ CITES generally is regarded as the most significant and successful multilateral treaty for wild fauna and flora conservation.²⁷ Its widespread acceptance has been proven due to the ratification of the treaty by most countries in the world.²⁸ Recognising that certain species may be

See Patel, "Endangered Species", at 207-9; Burns, "CITES", at 222-23.

²² See China Times (Taipei), 27 Mar. 1994, at 6th edition. Cf. Seeing the close connection between wildlife and drug smuggling, one commentator urges that international community should treat illegal wildlife trade as seriously as drug and weapon smuggling that are considered as universal crimes. See Patel, "Endangered Species", at 201-03.

²³ See China Times (Taipei), *id.*

²⁴ *Id.*

²⁵ Linden, "Tigers on the Brink", at 58.

²⁶ It has been observed that the CITES regime has several inherent weakness, such as the failure of addressing the critical issue of habitat destruction, the stipulation of exceptions to its general rules and the permission of a party to enter reservations to the treaty. See generally Southworth III, "GATT and the Environment", at 1005.

²⁷ Lyster, *International Wildlife Law*, at 240; Favre, *Endangered Species*, at xvii.

²⁸ As of January 1998, 145 countries have ratified the treaty. See Vice, "Biodiversity Treaties", at 635-39 and n. 94.

threatened by over-exploitation through international trade,²⁹ CITES focuses mainly on the regulation of international trade in those species and their products. It is one of the typical regimes applying trade measures to achieve the aim of the treaty.³⁰

To categorise species that need preservation, CITES lists those species in three appendices based on their degree of endangerment. Appendix I lists all species threatened with extinction, whose trade "must be subject to particularly strict regulation," and "only be authorised in exceptional circumstance."³¹ Species listed in Appendix II are not necessarily endangered but may become so without strict regulation.³² Finally, CITES allows a Party to identify and regulate species not in Appendix I or II, but which may be listed in Appendix III according to its own legislation, requiring international cooperation in enforcing the national law.³³ It should be noted that the listing of species in Appendix I or II is not inflexible. It may be adjusted so as to add, remove, uplist or downlist a species if the specific requirements are met.³⁴

The CITES's control of trade in listed species functions by ways of a permit system. The export and import of specimens of species included in any Appendix cannot proceed without the prior grant of a permit.³⁵ The agreement also spells out certain conditions that must be met for a permit to be granted.³⁶ Certain competent domestic organs are assigned the authority to decide whether the conditions have been satisfied.³⁷

The conservation of rhinoceros and tigers had been brought to CITES's attention at an early stage. All tiger subspecies were listed as an Appendix I species at the very inception of CITES, except for the Siberian subspecies.³⁸ The rhinoceros species have been listed in Appendix I catalogue for twenty years.³⁹ In 1987, responding to

²⁹ See CITES Preamble.

³⁰ Apart from CITES, some other MEAs using the trade measures to fulfill the treaty's mandate include the Basel Convention on Transboundary Movements of Hazardous Waste (into force, 5 May 1992) and Montreal Protocol on Substances that Deplete the Ozone Layer (into force, 1 Jan. 1991).

³¹ CITES, Art. II, para. 1.

³² *Id.* Art. II, para. 2.

³³ *Id.* Art. II, para. 3.

³⁴ The provisions regarding amendments to Appendices I and II *see id.* art. XV (1).

³⁵ *Id.* Art. III, IV, V.

³⁶ *Id.*

³⁷ *Id.*

³⁸ The Siberian tiger, *Pantera tigris altaica*, was listed in Appendix I in 1987. The Ninth Conference of the Parties, Report of the Secretariat, Interpretation and Implementation of the Convention: Trade in Tiger Specimens, Doc. 9.29, at 1 (1994).

³⁹ In 1977, CITES resolved to list rhinoceros in Appendix I. The Ninth Conference of the Parties, Report of the Secretariat, Interpretation and Implementation of the Convention: Trade in Rhinoceros

the threat to the survival of rhinos, which was considered to be attributable to continuous trading activities, the COP of CITES adopted a resolution urging all parties to ban all trading of rhinoceros parts and destroy all government stocks of rhinoceros horn.⁴⁰ To secure compliance with the resolutions, it further recommended that the parties "use all appropriate means (including economic, political and diplomatic) to exert pressure on countries continuing to allow trade in rhinoceros horn. . ."⁴¹

The CITES institutions, particularly the Standing Committee, were keen to put more pressure on consumer countries, especially China and Taiwan, than on producer nations. The wave of condemnation on Asian countries' failure to control illegal trade in tiger and rhinoceros parts effectively reached its climax in early 1990s. The Committee, in response, subsequently passed several decisions and recommendations concerning the enforcement measures. In March 1993, the 29th Meeting of the Committee recommended a period of six months during which the two countries were requested to crack down on the activities of illegal trade.⁴² Examining the implementation of CITES's requirements by China and Taiwan, in September 1993, the Committee determined that the enforcement measures taken by the countries were "not adequate to sufficiently control illegal trade in rhinoceros horn and tiger parts, including failure to comply with measures outlined in Resolution Conf. 6.10."⁴³ Simultaneously, it recommended that parties consider the prohibition of wildlife trade against China and Taiwan.⁴⁴ Moreover, it set the minimum criteria to be met within the consumer countries. These include:

1. identification and marking of stocks of rhinoceros horn;
2. consolidation of both rhinoceros horn and tiger bone stocks and their adequate control by the States;
3. adoption and implementation of adequate legislative measures; and

Specimens, Doc. 9.28, at 1 (1994).

⁴⁰ The Sixth Conference of the Parties in Resolution CONF. 6.10 (1987).

⁴¹ *Id.*

⁴² See Linden, "Tigers on the Brink", at 55; Shih, "Multilateralism", at 121.

⁴³ The Decisions of the Standing Committee on Trade in Rhinoceros Horn and Tiger Specimens, Brussels, Sept. 1993, at para. 6 [hereinafter Brussels's Decision].

⁴⁴ *Id.* According to the decision, it was contended that the committee has set the stage for trade sanctions to be imposed against China and Taiwan. See Blank, "Environmental Trade Measures", at 70. Yet, strictly speaking, the vagueness of the paragraph makes it difficult to claim that sanctions against these countries have been explicitly urged by the decision.

4. provision for adequate enforcement of the above measures;⁴⁵

Nevertheless, it recognised the difficulty of eliminating such illegal trade in a short time and decided to give the governments more time to reach CITES requirements before adopting more coercive resolutions against them.⁴⁶ In addition, it should be noted that, apart from China and Taiwan, a number of countries, like Russia, Hong Kong, Yemen, and some African States also were urged to strengthen their control of the illegal trade, or halt poaching of the species.⁴⁷ Interestingly, no recommendation has been made on a using trade ban to counter their violations. Meanwhile, various CITES delegations visited the consumer nations between November 1993 and January 1994 to provide advice and assistance to those countries and to monitor their progress.⁴⁸

Subsequently, in March 1994, the Committee reconvened in Geneva to review the progress of countries which were responsible for the decline of the animals' population. Although the progress of China was still criticised severely by environmental groups,⁴⁹ the Committee determined that China had met the minimum criteria put forth in the previous decision, while stating that further actions by China were still needed.⁵⁰ With respect to Taiwan, the Committee was more critical. In its draft decision, it stated that Taiwan had not yet implemented the minimum requirements. Then, a draft resolution proposing a wildlife product embargo against the country was put forward.⁵¹ In the event, however, the embargo proposal was not adopted.⁵² The resolution, as enacted, merely recommended that "further clear progress be demonstrated by the time of the next meeting of the Conference of the

⁴⁵ Brussels's Decision, at para. 7.

⁴⁶ *Id.*

⁴⁷ *Id.* at paras. 11, 13, and 14.

⁴⁸ The Ninth Conference of the Parties, Report of the Secretariat, Interpretation and Implementation of the Convention: Trade in Rhinoceros Specimens, Doc. 9.28, at 2 (1994).

⁴⁹ See China Times (Taipei), 26 Mar. 1994, at 1st edition. A letter from a number of the US Congress members urging the President to take action against both China and Taiwan indicated that China's progress was no better than that of Taiwan. See Gerstenzang, "US Will Impose Trade Sanctions Against Taiwan to Protect Wildlife", L.A. TIMES, 12 Apr. 1994, at A7.

⁵⁰ The Decisions of the Standing Committee on Trade in Rhinoceros Horn and tiger Specimens, Geneva, Mar. 1994, at para. 7 [hereinafter Geneva's Decision].

⁵¹ China Times (Taipei), 25 Mar. 1994, at 1st ed. The draft decision specifies: The Standing Committee "expresses concern that the actions agreed by the authorities in Taipei towards meeting the criteria have not been implemented in an expedient manner and agrees to recommend that Parties implement stricter domestic measures including prohibition of trade in wildlife species now."

⁵² The move of the Standing Committee can be interpreted to the acknowledgement of the progress made by Taiwan. See China Times (Taipei), 26 Mar. 1994, at 1st ed. Cf. One possible reason why the March Decision made no express reference to a trade embargo was that the original Standing Committee recommendation to that effect (and the Pelly certification) was still operative. See Crawford,

Parties,"⁵³ which might be interpreted to grant Taiwan an eight-month of observation.⁵⁴ Meanwhile, a number of other countries, including Russia, Viet Nam, Zambia and the Lao Peoples' Democratic Republic, were also required to undertake further actions for the conservation of rhinos and tigers.⁵⁵

The Ninth CITES COP held in Florida, US, in November of 1994 was the subsequent event where conservation of rhinos and tigers was dealt with in depth. In contrast to the previous decisions made by the Standing Committee, the COP seemed convinced that international cooperation and public education rather than trade sanctions were more effective in addressing the issue. Accordingly, no trade sanctions were proposed against any specific country, including Taiwan. Instead of resolving enforcement measures, the meeting adopted a recommendation urging:

(1) adequate legislation implementation; (2) law enforcement cooperation; (3) strategic innovations for replacing items made with tiger and rhinos part; (4) funding for conservation plans; and (5) educational programs aimed at reducing the demand.⁵⁶

B The application of the US Pelly Amendment sanctions against Taiwan

1 The US Pelly Amendment to the Fishermen's Protective Act

(a) The enactment and revision of the law

The 1971 Pelly Amendment to the Fishermen's Protective Act⁵⁷ was initially enacted to express US serious concern over the salmon depletion in the Atlantic Ocean.⁵⁸ In 1969, the International Commission for the Northwest Atlantic Fisheries (ICNAF)⁵⁹ decided to ban salmon fishing on the high seas. Three of the contracting parties to the agreement (Denmark, Norway, and West Germany) resisted the proposal by invoking the objection procedures of the ICNAF,⁶⁰ which allows them not to be bound by the ICNAF's fishing ban. In response to the situation, the US House Representative Thomas Pelly advocated legislation, as an amendment to the

"Rhinoceros and Tiger" at 565.

⁵³ Geneva's Decision, at para. 8.

⁵⁴ China Times (Taipei), 26 Mar. 1994, at 1st ed.

⁵⁵ Geneva's Decision, at para. 10.

⁵⁶ See The Ninth Conference of the Parties in Resolution CONF. 9.13, 9.14 (1994).

⁵⁷ Pub. L. No. 92-219, 85 Stat. 786 (codified as amended at 22 U.S.C. 1978).

⁵⁸ H. R. Rep. No. 468, 92d Cong., 1st Sess. 1, reprinted in 1971 US Code Cong. & Admin. News, at 2410 [hereinafter Pelly Report].

⁵⁹ The ICNAF was created "for the investigation, protection and conservation of the fisheries of the Northwest Atlantic Ocean." International Convention for the Northwest Atlantic Fisheries, 8 Feb. 1949, Preamble, 1 U.S.T. 477 T.I.A.S. No. 2089, 157 U.N.T.S. 158.

⁶⁰ The fishing conservation regime allows parties to object to regulatory measures adopted by it. See the International Convention for the Northwest Atlantic Fisheries Relating to Entry Into Force of Proposals Adopted by the Commission. 29 Nov. 1965, Protocol, 21 U.S.T. 567, 568-69, T.I.A.S. No.

Fishermen's Protective Act, aimed at enforcing the conservation measures required by the international fishery regimes⁶¹ to which the US is a contracting party.⁶² To fulfill the goal, the law mandates a prohibition on the importation of fishery products from the alleged offending country whose policy is deemed against the agreements.

The law thus formed a typical example of the wielding of economic leverage to impose a restriction on access to the US markets in an attempt to reach the goal of conservation of fishing resources.⁶³ In practice, the dominant intention was to force compliance with the international whale regime.⁶⁴

In 1978, the scope of the law was expanded to the extent that the protection of endangered or threatened species became an additional main concern. In the wake of the US ratification of CITES at the time, the introduction of the bill (H.R. 10878) reflected US strong willingness to give effect to the agreement.⁶⁵ On the other hand, of course, the successful use of the statute in the conservation of whales in the early stage of the legislation had encouraged the inclusion of the species conservation in the Pelly Amendment.⁶⁶ Moreover, the inclusion also demonstrated the US's commitment to protect whales due to the fact that the original provision did not cover the activity of trade in whale.⁶⁷ But, the prescribed embargoed products were limited only to *wildlife products* exported from the target country. The Committee on Merchant Marine and Fisheries explained that "H.R. 10878 would provide the President with the authority to embargo only wildlife products from the offending nation. He could not decide to embargo other products even if the Secretary found that the offending country was diminishing the effectiveness of the Convention."⁶⁸

Later, in 1992, the act was further revised to expand the range of banned products to the extent that the importation of *any products* from the target country

6840, 756 U.N.T.S. 220.

⁶¹ Pelly Report, at 2411-13.

⁶² 22 U.S.C. 1978, (h) (3).

⁶³ See McLaughlin, "Trade Sanctions", at 16; Caron, "Fishery Sanctions", at 318.

⁶⁴ See Martine Jr. and Brennan, "Whaling", at 295; Caron, *id.* at 317-26; Chayes and Chayes, *New Sovereignty*, at 94-96. As of 1996, the US has threatened to impose Pelly sanctions to preserve whale for eleven times. See Appendix B, Table 1.

⁶⁵ Zoller, *Enforcing International Law*, at 94.

⁶⁶ *Id.* In 1974, US successfully pressured Japan and USSR to adhere to the whaling quota prescribed by the International Whale Commission. Then, in 1978, Chile, Peru, and South Korea, under the threat of the Pelly sanctions, decided to join the whale convention. See Charnovitz, "Pelly Amendment", at 763-64. Chayes and Chayes, *New Sovereignty*, at 94.

⁶⁷ Martine Jr. and Brennan, "Whaling", at 296.

⁶⁸ H. R. Rept. 95-1029, 95th Congress, 2d sess. (1978), at 11; [1978] US Code Cong. and Adm. News, Vol. 3 (1979), at 1775.

could be prohibited.⁶⁹ Accordingly, the resultant impact from the use of general trade sanctions upon an embargoed nation could be huge, particularly where exports to the US amounted to a substantial portion of its total trade.⁷⁰ The modification was based on the belief, according to the US Congress, that the original law was "drawn so narrowly that an embargo under it could quite likely harm the United States more than the embargoed nation."⁷¹

In conclusion, the enactment and revision of the Pelly legislation manifests the US's ambition to advance the effectiveness of international conservation regimes, particularly for living species, so long as it becomes bound by the agreements.⁷² The implementation of a Pelly sanction, therefore, can be defined as a *national* enforcement of *environmental* standards by imposing *trade* measures operated in the form of an import ban.

(b) The operation of the Pelly enforcement action

The enforcement process provided in the Pelly Amendment is divided into two stages, which are considered to be "fairly straightforward".⁷³ The initial one is the procedure of certification. Regarding fish, the law requires the Secretary of Commerce to determine the situation whether a fishing practice conducted by the nationals of a country will "diminish the effectiveness of an international fishery conservation program."⁷⁴ Likewise, regarding endangered species, the Secretary of Commerce or the Secretary of the Interior is responsible for identifying the nationals that "are engaging in trade or taking which diminishes the effectiveness of any international program for endangered species."⁷⁵ Further, in implementing such a broad measure effectively, the Secretaries are required to (a) periodically monitor the activities of foreign nationals that may affect the international program; (b) promptly investigate any activities that may amount to such offence mentioned; (c) promptly conclude and reach a decision.⁷⁶ Ultimately, following a positive finding, the officials *must* make a "certification" of the fact to the President.⁷⁷

⁶⁹ High Seas Driftnet Fisheries Enforcement Act, 201 (a)(1), 106 Stat. 4900, 4904 (1992) (to be codified at 22 U.S.C. 1978(a)(4)).

⁷⁰ Charnovitz, "Pelly Amendment", at 761.

⁷¹ H.R. Rep. No. 580, 101st Cong., pt 1, at 4.

⁷² 22 U.S.C. 1978, (h)(3) and (4).

⁷³ Baker, "Non-Party Compliance", at 351.

⁷⁴ 22 U.S.C. 1978, (a)(1).

⁷⁵ *Id.* (a)(2).

⁷⁶ *Id.* (a)(3)(A)(B)(C).

⁷⁷ *Id.* (a)(1)(2) [emphasis added].

On the other hand, apart from the law of the Pelly Amendment, a number of US conservation statutes for living species, covering marine mammals, African elephants, driftnet fishing, also provide Pelly-type certification and may result in an imposition of trade sanctions.⁷⁸ In effect, the official determinations made under individual legislation regarding foreign offenses are "deemed" a certification for the purpose of the Pelly Amendment. By means of this interconnection, the Pelly certification may generate broader influence and thus, as McLaughlin maintained, "[serve] as a supplemental procedural mechanism to enforce the substantive requirements of other marine [living species] conservation statutes."⁷⁹

It should be noted that the identification of "diminishing of effectiveness" is made on a solely *unilateral* basis, despite the fact that the Pelly legislation is designed to enforce *multilateral* agreements.⁸⁰ Further, as observed by Charnovitz, the test of diminishing the effectiveness is rather vague and subject to various factors, "[including] non-ratification of a treaty, non-observance of a treaty, or even actions unrelated to a treaty such as domestic sales of an endangered species."⁸¹ Thus, a Pelly certification may still be launched regardless of whether or not a violation of international law has occurred.⁸² For instance, the fact that Japan and the Soviet Union's objection to the measures adopted by the Whaling Convention⁸³ has been legally sanctioned did not prevent them from being certified under the Pelly Amendment in 1974.⁸⁴ Similarly, in 1978, the US launched the Pelly certification against the whaling practices of Chile, Peru, and South Korea,⁸⁵ which had not been in breach of the International Whaling Commission (IWC) due to their non-member status.

⁷⁸ Those statutes, *inter alia*, include the 1976 Packwood-Magnuson Amendment, 16 U.S.C. 1821(e)(2)(1988); 1987 Driftnet Impact Monitoring, Assessment and Control Act, 16 U.S.C. 1822 note (1988); 1988 African Elephant Conservation Act, 16 U.S.C. 4201-45; 1988 Amendment to the Marine Mammal Protection Act, 16 U.S.C. 1371(a)(2)(D); 1990 Driftnet Act Amendments, 16 U.S.C. 1826 (Supp. IV 1992); 1990 Driftnet Amendments to the Marine Mammal Protection Act, 16 U.S.C. 1371(a)(2)(E) (Supp. IV 1992); 1992 International Dolphin Conservation Act, 16 U.S.C. 1411-18 (Supp. IV 1992); 1992 High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. 1826(a)(b)(1) (Supp. 1993). See also Charnovitz, "Pelly Amendment", at 761-62; McLaughlin, "Trade Sanctions", at 17-19.

⁷⁹ McLaughlin, *id.*, at 16.

⁸⁰ Charnovitz, "Pelly Amendment", at 760 [emphasis added].

⁸¹ *Id.*

⁸² *Id.* See also McDorman, "Fish Import Embargoes", at 484-85. Cf. Zoller, *Enforcing International Law*, at 85.

⁸³ International Convention for the Regulation of Whaling (ICRW), 2 Dec. 1946, in force 10 Nov. 1948, 61 Stat. 1761, T.I.A.S. No. 1849, 161 U.N.T.S. 72. The treaty permits parties to avoid being bound by a quota by entering an objection to it. *Id.* art. V(3).

⁸⁴ See Letter from Secretary of Commerce Frederick Dent to President Gerald Ford (12 Nov. 1974).

⁸⁵ See Letter from Secretary of Commerce Juanita Kreps to President Jimmy Carter (14 Dec. 1977).

The second stage of the Pelly actions rests on the discretion of the President in implementing trade embargoes. Although Pelly certifications are, in principle, mandatory, whether a sanction will be invoked is entirely subject to the judgement of the President. Upon receipt of any certification, the President has a period of sixty days to decide whether an import ban will be authorised before notifying the Congress of any action taken by him. Meanwhile, a diplomatic consultation might be undertaken. As Zoller remarked, "[t]he foreign state is served a warning, *i.e.*, diplomatic representations are made to make it aware of the threat that is hanging over . . . The offending state is thus given a chance to mend its way."⁸⁶ Their operation in practice had showed that some certified countries' deference to the US's pressure did defuse the use of trade sanctions. The two certifications for whaling conservation discussed above provide good examples.⁸⁷ But, on other hand, continued resistance to the US dictation may not necessarily lead to a sanction. For instance, since 1990, Norway has been certified four times for its whale hunting policy.⁸⁸ None of these certifications has been able to force the country to abide by the US command, and no sanctions have actually been taken against Norway. Evidence suggests that political considerations often influenced such decision.⁸⁹

If no import ban is imposed, the President is required to explain this decision to Congress.⁹⁰ If the President decides to impose trade sanctions, he also may exercise discretion with respect to the duration and extent of such a ban.⁹¹ Interestingly, the Pelly law requires the President's discretion to be consistent with the General Agreement on Tariff and Trade (GATT). Yet, arguably, the institutional constraint does not warrant the eventual legitimacy under the GATT regime. Zoller thus rightly observed that "The lip-service paid by the Pelly Amendment to the General Agreement on Tariff and Trade does not clear this vivid inconsistency."⁹² Since no case has yet raised this issue of the consistency between a Pelly sanction and the GATT mandate, the legal implication of the arrangement remains uncertain.

⁸⁶ Zoller, *Enforcing International Law*, at 90.

⁸⁷ See n. 66 above.

⁸⁸ The Pelly certifications were made against Norway in 1990, 1992, 1993, and 1996. See Charnovitz, "Pelly Amendment", at 766, 768-69. See also Appendix B, Table 1.

⁸⁹ It was reported that Norway's role in the Middle East peace process enabled it to escape the sanctions. See "Is This Really a Good Time to Punish Norway?" WASH. Times, 23 Sept. 1993, at A22. The Bush and Clinton Administrations' response to Norway's resuming the whaling see Caron, "Whaling", at 166-68.

⁹⁰ 22 U.S.C. 1978 (b).

⁹¹ 22 U.S.C. 1978 (a)(4).

After a periodical review of the activities of the nationals of the offending country, the Secretary concerned shall terminate the certification based on the determination that "the reasons for which the certification was made no longer prevail."⁹³ The decision of termination, together with a statement of the relevant facts, shall be published in the Federal Register.⁹⁴

2 The decision to launch the Pelly environmental trade embargo

With respect to the protection of endangered species, the US appeared the most aggressive State upholding the use of economic pressure to force the consumer nations to cease trade in these animals' parts. In late 1992, the US placed Taiwan, China, South Korea and the Republic of Yemen on the list of potential targets of Pelly sanctions.⁹⁵ Following discussion with the US, both Korea and Yemen agreed to accede to CITES and to close down their domestic rhino trade. Then, satisfied with their efforts, the Interior Department withheld the Pelly Amendment certification.⁹⁶

At the 30th Standing Committee's meeting in September 1993, the US delegates led by the Interior Secretary, Bruce Babbitt, consistently took a strong stand against consumer countries, particularly China and Taiwan, by advocating coercive measures to secure compliance with CITES standards.⁹⁷ Concurrently with the CITES meeting, which called for a wildlife trade ban against both China and Taiwan, the US Department of the Interior soon certified to President Clinton under the Pelly Amendment that both China and Taiwan were diminishing the effectiveness of CITES.⁹⁸ Although the US recognised that "some progress has been made" by them, it determined that "they fall short of the international conservation standards of CITES."⁹⁹

In response, upon receipt of the certification, President Clinton, in a letter to Congress in November 1993, suggested that trade sanctions be imposed against both countries unless they could "demonstrate measurable, verifiable, and substantial

⁹² Zoller, *Enforcing International Law*, at 87, n. 78; McLaughlin, "Trade Sanctions", at 16, n. 76.

⁹³ 22 U.S.C. 1978 (d).

⁹⁴ *Id.*

⁹⁵ "Administration Moves to Halt International Trade in Tiger and Rhino Parts", Department of the Interior News Release, 9 June 1993.

⁹⁶ *See id.*

⁹⁷ It was observed that Bruce Babbitt, an ardent environmentalist, played a major role in the effort to put pressure on China and Taiwan. *See* Linden, "Tigers on the Brink", at 58.

⁹⁸ Letter from Secretary of the Interior Bruce Babbitt to President William Clinton (7 Sep. 1993).

⁹⁹ *Id.*

progress" by March 1994.¹⁰⁰ Meanwhile, the administration also formulated concrete criteria that those nations would be compelled to meet, if China and Taiwan were to, "demonstrate their commitment to the elimination of trade in rhinoceros and tiger parts and products."¹⁰¹ These included as a minimum:¹⁰²

1. Consolidation and Control of Stockpiles;
2. Formation of a Permanent Wildlife or Conservation Law Enforcement Unit with Specialised Training;
3. Development and Implementation of a Comprehensive Law Enforcement and Education Action Plan;
4. Increased Enforcement Penalties;
5. Prompt Termination of Amnesty Periods for Illegal Holding and Commercialisation of Wildlife or their Products; and
6. Establishment of Regional Law Enforcement Arrangements;

It is worth noting that, in contrast to the CITES's standards, the US deliberately imposed additional criteria on the targets. Clearly, the deadline set by the Clinton Administration was intended to coincide with the next meeting of the Standing Committee.¹⁰³ It was revealed that the US intended to "encourage delegates to renew their September [1993] call to action," remaining firm on its position favouring the use of trade sanctions.¹⁰⁴ Secretary Babbitt, on the eve of the Geneva meeting, remarked that "[a]ll the CITES members will be taking signals from this meeting. There may not be another chance to save the tiger."¹⁰⁵ Upon the release of the CITES meeting's decision, which evaluated the progress of Taiwan and China with differential judgement, President Clinton, soon thereafter, announced a ban on the importation of certain wildlife products from Taiwan because of "its *lack of progress* in eliminating its illegal trade in tigers and rhinoceroses."¹⁰⁶ In his letter to Congress, President Clinton stated that the Administration would "follow the recommendation of the CITES Standing Committee and direct that imports of wildlife specimens and products from Taiwan be prohibited. . . ." ¹⁰⁷ The President acknowledged that the

¹⁰⁰ 1993 President's Message to Congress.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Blank, "Environmental Trade Measures", at 70-71.

¹⁰⁴ Linden, "Tigers on the Brink", at 56.

¹⁰⁵ *Id.*

¹⁰⁶ See President's Message to Congress on Rhinoceros and Tiger by China and Taiwan (11 Apr. 1994)[hereinafter 1994 President's Message to Congress].

¹⁰⁷ *Id.*

Pelly Amendment granted him authority to impose a broader range of sanctions, but decided that the sanctions imposed against Taiwan was appropriate at that time.¹⁰⁸ The trade embargo, in effect, came into force in August 1994.¹⁰⁹

Actually, the US desire to select Taiwan as the only eventual target of the Pelly sanctions was revealed at the CITES meeting in Geneva, where it openly and vigorously attacked Taiwan's efforts as insufficient.¹¹⁰ If CITES could provide President Clinton with more substantial diplomatic cover for imposing sanctions,¹¹¹ obviously it would make the trade embargo against Taiwan more credible and justifiable. Certainly, the pressure from environmental groups pressing for coercive measures to be taken against Taiwan seemed to be irresistible.¹¹²

It is interesting, however, to note that the US's action on Taiwan, to some extent, was a reflection of its own policy-making,¹¹³ although the sanctions carried the intention to enforce compliance with the CITES mandate. In response to the Geneva meeting, which made no express reference to a trade embargo against Taiwan, the US delegate to the CITES Standing Committee remarked that "the decision regarding whether Taiwan will be sanctioned under the Pelly Amendment will be made subject to the US's own judgement independent of the CITES influence."¹¹⁴ Thus, it is observed that although the US's decision "might be influenced by the CITES recommendation, it would not depend on the Committee's recommendations."¹¹⁵

3 Taiwan's initial reaction toward the sanctions

Because Taiwan was convinced that substantial progress had been made in improving the enforcement measures regarding illegal rhinos and tiger trade,¹¹⁶ it is

¹⁰⁸ *Id.*

¹⁰⁹ Imposition of Prohibitions Pursuant to Section 8 (a)(4) of the Fishermen's Protective Act of 1967, as Amended, 59 Fed. Reg. 40, 463 (1994).

¹¹⁰ See United Daily News (Taipei), 28 Mar. 1994, at 6th edition.

¹¹¹ See Linden, "Tigers on the Brink", at 56.

¹¹² Given that Taiwan and China have "been tried and convicted by CITES and the US," the EII stressed that "A judgement of guilty with no penalty imposed hardly represents any deterrent." Likewise, the Environmental Investigation Agency (EIA) maintained that "It is time for us to make it plain that we are not going to stand by and watch the last tiger disappear." See Linden, *id.*

¹¹³ See The Ninth Conference of the Parties, Report of the Secretariat, Interpretation and Implementation of the Convention: Trade in Rhinoceros Specimens, Doc. 9.28, at 4 (1994). It specifies that "... Following the assessment by the Standing Committee at its 31st meeting, and *also independently by the Government of the United States of America*, in April the President of the United States of America announced an embargo on Trade with the province of Taiwan in wildlife specimens and products..." [emphasis added].

¹¹⁴ United Daily News, 26 March 1994, at 4th edition.

¹¹⁵ Crawford, "Rhinoceros and Tiger", at 568, n.106.

¹¹⁶ The remark by the vice chairman of the Council of Agriculture, Lin Shiang-nung, against environmental group's attacking Taiwan's insufficient progress was quoted by Linden that "We feel so

not surprising that Taiwan felt extremely disappointed and discontent at the US's first ever implementation of the Pelly sanctions against it. The action sparked strong criticism in Taiwan partly because the action seemed akin to verdict of 'guilty' in a controversial case.

Other than delivering a moderate protest to the US government,¹¹⁷ the Taiwanese Administration simply declared such action as unjust and unfair, and a deeply regrettable decision.¹¹⁸ In contrast, the reaction of Taiwan's congressmen to the Pelly sanctions was relatively vigorous. Broadly speaking, they regarded that the Administration's reaction confined to oral protest was insufficient to express Taiwan's disapproval of the trade embargo.¹¹⁹ To counterbalance the economic loss resulting from the import ban, several legislators suggested that a score of anti-sanctions measures be taken against the US, such as the revocation of contracts for American agricultural products.¹²⁰

Taiwan's failure to amend the conservation law to increase penalties against the illegal trade was believed to be one of the major reasons that triggered the embargo.¹²¹ The message contained in the 1994 President Clinton's letter to the US Congress clearly indicated that the enactment of appropriate law by Taiwan would constitute a ground for the sanctions to be adjusted accordingly.¹²² What annoyed Taiwan most appears to be that it was forced to pass the amendment of Wildlife Protection Law so hastily that careful examination of the whole text of the law became unattainable. Congressmen in Taiwan were very aware of the urgency of amending the law in order to end the trade ban. Most of them, however, were reluctant to pass the law merely because of US pressure.¹²³ Some also deemed the hasty legislation to be irresponsible. In addition, they complained that their discretion over legislation would be in danger of being subordinated by US coercion.¹²⁴ Overall, they stressed that more time should be allocated regarding the modification of the critical law in order to adequately

disappointed that we are doing so much and getting so little credit for it." Linden, "Tigers on the Brink", at 57.

¹¹⁷ See United Evening News (Taipei), 1 Apr. 1994, at 1st edition; Kenworthy, "President Imposes Sanctions on Taiwan", Wash. Post, 12 Apr. 1994, at C1.

¹¹⁸ See general report from China Econ. News Serv. (Taipei), 13 Apr. 1994; S. China Morn. Post (Hong Kong), 9 Apr. 1994, at 8; Kenworthy, *id.*

¹¹⁹ Central Daily News (Taipei), 11 Aug. 1994, at 3rd edition.

¹²⁰ China Times (Taipei), 12 Aug. 1994, at 6th edition.

¹²¹ See 1994 President's Message to Congress.

¹²² *Id.*

¹²³ Independence Evening News (Taipei), 14 Apr. 1994, at 4th edition.

¹²⁴ Commons Daily News (Taipei), 14 July 1994, at 6th edition.

accommodate the particular situation in Taiwan as well as the international requirement.

4 Taiwan's increased efforts at conservation

Although Taiwan declared that its conservation tasks on protecting endangered species would not be affected by the US unilateral coercion,¹²⁵ in reality, Taiwan proved incapable of ignoring the adverse effects caused by the sanctions, such as the economic loss and the tarnished reputation mentioned above. In an attempt to remove the sanctions, the measures adopted by Taiwan included enhancement of mutual consultation with the US and adjustment of its national policy to be in conformity with the US's requirements.

Shortly after the imposition of the sanctions, Taiwan started to engage in an intense dialogue and frequent contact with the competent US authority.¹²⁶ The task aimed to ensure that Taiwan's recent progress could be entirely known to the US and allow the former to perceive instantly the response of the latter.¹²⁷ In order to further their mutual communication, Taiwan decided to send delegates to the US to explain its observance of the required standards.¹²⁸ Meanwhile, US officials were invited to Taiwan to effect a close investigation of Taiwan's progress.¹²⁹

In addition, the *Amendment to Wildlife Conservation Law* (WCL) was given priority in the Taiwan Congress's legislation schedule,¹³⁰ notwithstanding its initial resistance. Eventually, on October 29, 1994, prior to the Ninth CITES's COP in November, the legislative authority approved the amendments. The law significantly toughened the penalties against illegal trade in endangered species to a maximum of seven years in prison and a fine equaling \$94,339 in US dollars.¹³¹ It was observed

¹²⁵ See the statement by the ROC Ministry of Foreign Affairs, United Daily News (Taipei), 13 Apr. 1994, at 3rd edition.

¹²⁶ It is the US Fish and Wildlife Service, the Department of the Interior, responsible for reviewing Taiwan's progress on wildlife protection.

¹²⁷ For instance, soon after Taiwan passed the amendments to its Wildlife Conservation Law, it immediately notified US the result via its representative in the US. The US replied that that was an encouraging result, and suggested that enforcement measures still be enhanced. See United Daily News (Taipei), 29 Oct. 1994, at 6th edition. Also, after the critical law was amended, the US requested Taiwan to finish the Implementing Regulations of the Law. It was believed that the document was very helpful in assisting US to review Taiwan's progress. See United Daily News (Taipei), 4 May 1995, at 6th edition.

¹²⁸ Central Daily News (Taipei), 5 May 1995, at 3rd edition.

¹²⁹ The work was conducted by a US interagency delegation to Taiwan in Mar. 1995. (The US officials concluded that compared with the work of last year, Taiwan has made apparent progress, despite some relevant tasks, like personnel training and law enforcement still have a few rooms to be improved.) See United Daily News (Taipei), 18 Mar. 1995, at 6th edition.

¹³⁰ China Times (Taipei), 11 Aug. 1994, at 6th edition [emphasis added].

¹³¹ The Wildlife Conservation Law, Art. 40, Section 2.

that penalties under the WCL were now among the stiffest in Asia.¹³² Moreover, pursuant to the new law, holders of protected wildlife products are required to report their possession to the authorities.¹³³ In addition, the law authorises the establishment of a new *Nature Conservation Police*, which is designed to crack down effectively on the wildlife crime.¹³⁴

With respect to the progress of the law enforcement, after the imposition of sanctions, Taiwan strengthened the investigation and punishment of violations of the law. It was estimated that 49 cases of tiger-bone and 23 cases of rhino-horn illegal trade were uncovered.¹³⁵ Meanwhile, Taiwan had effectively controlled the stocks of rhino horn and tiger bone by accomplishing registration of all relevant animal products.¹³⁶

On educating people to understand the urgency and importance of preserving endangered species, all relevant government agencies and private conservation groups have been deeply involved in launching a massive educational campaign aimed at creating a better conservation ethic in Taiwan.¹³⁷

In addition to economic pressure, the US also provided a "carrot" to encourage cooperation between two countries on critical conservation work. Following the imposition of sanctions, both sides had signed the Agreement on Technical Cooperation in Conservation of Flora and Fauna. The agreement covers the elements relating to the full criteria required by the US outlined in previous statements.¹³⁸ Indeed, the assistance offered by the US generated substantial effect in helping Taiwan make significant progress in enforcing its WCL.¹³⁹

5 Removal of the sanctions and termination of the Pelly certification

In March 1995, a US interagency delegation visited Taiwan to make a direct assessment on whether Taiwan's recent efforts had fulfilled the US criteria. The

¹³² See the report of the Department of the Interior: Taiwan: CITES Implementation Status Report Pursuant to Pelly Certification for the Period 30 June 1995 to 30 June 1996 [hereinafter Taiwan's Implementation Report].

¹³³ The Wildlife Conservation Law, art. 31.

¹³⁴ *Id.* art. 22 [emphasis added].

¹³⁵ Liberty Times (Taipei), July 2, 1995, 3rd at edition.

¹³⁶ See Trade in Rhino Specimens, at 4.

¹³⁷ These tasks see The 1996 ROC Yearbook, at 203.

¹³⁸ The content includes: law enforcement cooperation, management of stocks of endangered species products, cooperation and exchange of information regarding wildlife forensics, training, communication on permits, and an exchange of information on public education and outreach.

¹³⁹ See News release from the US Fish and Wildlife Service, Taiwan helps protect endangered species: Interior Secretary Removes Certification (11 Sept. 1996)[hereinafter Taiwan helps protect endangered species].

delegation found that Taiwan had "largely satisfied" the criteria, and made recommendations for improvement.¹⁴⁰ Afterwards, in May 1995, a US interdepartmental panel consisting of officials from the Departments of the Interior, Justice and State as well as the US Trade Representative Office was held to decide whether the lifting of sanctions should be proposed to the President. They recognised Taiwan's efforts to curb the illegal trade of tiger bones and rhino horns and thus proposed to the Clinton Administration that the Pelly Amendment sanctions should be dropped.¹⁴¹

In June 1995, President Clinton announced that major steps had been taken by Taiwan and thus directed that the sanctions be lifted to end the trade embargo against Taiwan, which had roughly lasted for one year.¹⁴² In the statement, the President, in saying that "Our willingness to take *strong action* to back that concern was instrumental in bring about this change,"¹⁴³ attributed Taiwan's progress to the invocation of the trade sanctions. To justify the first ever Pelly sanctions, the statement further stressed that "[T]aiwan's prompt response demonstrates the importance of taking strong action to protect the earth's natural heritage."¹⁴⁴ Though the sanctions were removed, the certification remained in effect, and the President ordered the competent agency to continue monitoring Taiwan's ongoing progress and report to him within one year.¹⁴⁵

Eventually, impressed with the Taiwan's continuing progress identified in his report to President Clinton,¹⁴⁶ Interior Secretary Babbitt, in his letter to the President in September 1996, recommended termination of the Pelly certification against Taiwan.¹⁴⁷ In amplifying the success of the Pelly actions, the Secretary particularly called the official lifting of the certification "the end of a historic first chapter in the protection of globally important endangered species."¹⁴⁸

¹⁴⁰ The details of the delegation's recommendations and Taiwan's implementation of the recommendation *see* Taiwan Implementation Report.

¹⁴¹ "US Wildlife Trade Sanctions Expected to End in Two Weeks," Reuters News Service, 4 May 1995.

¹⁴² *See* Press release from the White House, President lifts Trade Sanctions Against Taiwan: Welcome Major Steps Taken to Protect Endangered Species (30 June 1995).

¹⁴³ *Id* [emphasis added].

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See* Taiwan Implementation Report.

¹⁴⁷ Bruce Babbitt's Letter to President Clinton Regarding the Termination of the Certification of Taiwan (10 Sept. 10, 1996).

¹⁴⁸ *See* Taiwan helps protect endangered species.

Conclusion

Among the various international pressures aimed at forcing Taiwan to improve its control of the illegal trade, the Pelly sanctions proved the most detrimental and coercive. Given the fact that Taiwan almost entirely deferred to the US's dictate on the conservation of rhinos and tigers, the economic tool authorised by the Pelly Amendment seemed to be productive. It has thus been overwhelmingly recognised that trade sanctions can run successfully and effectively in achieving environmental goals.¹⁴⁹ Moreover, the Pelly practice displayed a typical model of playing a "sticks and carrots" strategy in inducing Taiwan to change its conservation policy.¹⁵⁰ Such effectiveness, while highly praised, does not, however, necessarily guarantee the eventual legitimacy of the sanctions.

The experience of invoking the Pelly sanctions against Taiwan suggests that whether a Pelly sanction will be triggered is largely dominated by political factors rather than pure legal considerations. It was evident that China merited no less an international reprimand than Taiwan,¹⁵¹ as did various other countries which were required by CITES to improve their conservation and law enforcement measures. But only Taiwan was deliberately selected as the target. In determining whether China and/or Taiwan should be sanctioned, it appears that the US government chose the latter for reason of simplicity.¹⁵² Moreover, the fundamental conflict of visions, particularly on human rights issue between China and the US, make it difficult to sanction China.¹⁵³ It thus may be concluded that China's evasion of the Pelly

¹⁴⁹ *E.g.* Blank, "Environmental Trade Measures", at 67, 76; Patel, "Endangered Species", at 196, 207 and n. 309. In response to the eventual lift of the sanctions, WWF commented that "The experience with Taiwan shows trade sanctions to be effective tool in helping curb the deadly commerce in endangered species." Press Release from the World Wildlife Fund, World Wildlife Fund Statement on US Government Decision to Lift Pelly Amendment Sanctions Against Taiwan (30 June 1995). Likewise, American officials marked that "This is an excellent example of how properly designed trade measures can be an effective tool in enforcing international environmental agreements." Also, to highlight the effectiveness of the Pelly sanctions, Interior Secretary Babbitt remarked that "[w]e now know trade sanctions imposed on behalf of endangered species work. Thanks to the President's decisive move, Taiwan has now taken a number of steps to become part of an international effort to save these magnificent creatures from an irreversible and tragic loss." *See* Taiwan helps protect endangered species.

¹⁵⁰ Martin, Jr. and Brennan, "Pelly Amendment", at 314. The policy of "sticks and carrots" is commonly employed in promoting compliance with the prescribed international environmental standards. *See generally* Sand, "International Economic Instruments", at 2-13; Housman and Zaelke, "Competitive Sustainability", at 561-63; Charnovitz, "Environmental Cooperation", at 6-8.

¹⁵¹ *See* Charnovitz, "Pelly Amendment", at 771.

¹⁵² Because Taiwan is not a contracting party to the General Agreement on Tariffs and Trade (GATT), the US trade sanctions against Taiwan violated no US obligations under the trade regime. *See also* Crawford, "Rhinoceros and Tiger", at 569-70.

¹⁵³ A writer observes that "[h]aving chosen not to impose sanctions on China for its persistent

sanctions is a clear indication that the operation of Pelly sanctions is usually entangled with political and diplomatic considerations.

Unlike previous Pelly actions, the US's sanctioning of Taiwan appeared linked with the CITES enforcement decision. The implementation of the Pelly Amendment coinciding with the operation of the CITES Standing Committee showed the US's intention to bring its national policy closer to the international standard. Nonetheless, in the light of the above observation, a certain degree of discrepancy between CITES and the US Pelly Amendment practice remained undeniable. For instance, it may be complained that the US's decision to impose trade embargoes against Taiwan, to some extent, did not entirely echo the CITES's latest recommendation (Geneva meeting, March 1994) regarding the enforcement action upon Taiwan, which did not explicitly call for trade embargo against Taiwan, but only for an eight-month period of observation. Further, it set the standard beyond that of CITES, which Taiwan should apply, namely the increase of penalty against violations in domestic legislation; judging whether Taiwan have met that standard; and determining what penalty should be imposed. On the other hand, of course, it is in the US's discretion to determine whether the sanctions should be lifted, regardless of external influence. Thus, even though the Pelly Amendment is designed to enforce international conservation agreements, McLaughlin correctly maintained that: "Relating trade restrictions to an international agreement does not diminish the unilateral character of the sanctions imposed. . . . While clearly related to international agreements, the U.S. laws in this category use the threat of trade restrictions to increase greatly *unilateral U.S. influence* over other nations' environmental practices."¹⁵⁴ Overall, the practice of Pelly sanctions against Taiwan reflected the inherently unilateral character of the US legislation, in spite of its possible multilateral character.

violations of human rights, . . . , the Administration may find it hard to explain why it is acting now because of environmental wrongs." See Linden, "Tigers on the Brink", at 58. It was also observed that:

One hypothesis for why President did not impose sanctions on both countries is that he was facing an impending, controversial decision as to whether to reextend most-favored-nation privileges to China. If he imposed Pelly sanctions, that could make it harder to renew China's most-favored-nations status. Critics would say that the Clinton Administration cared more about tiger rights than about human rights.

See Charnovitz, "Pelly Amendment", at 771-72.

¹⁵⁴ McLaughlin, "Trade Sanctions", at 19; Charnovitz, "Pelly Amendment", at 774 [emphasis added].

**PART TWO: THE PELLY SANCTIONS AND GENERAL
INTERNATIONAL LAW**

Chapter 2

The Pelly Sanctions as Countermeasures

Introduction

The concept of "countermeasures", in a broad sense, extends to all forms of responsive actions taken by an injured State against the author State.¹ This term may refer to several specific actions within inter-State relationships, such as reprisals,² reciprocal measures,³ and retortion.⁴ For the purpose of this study, countermeasures, as defined in the Draft articles on State responsibility of the International Law Commission (ILC),⁵ mean measures taken against the offender by a State whose legal rights are injured by an internationally wrongful act. Even where such a measure is unlawful in principle, its wrongfulness is precluded by the existence of the prior unlawful act.⁶

The requirement that legitimate reprisal requires the existence of an injured subject was confirmed in the *Naulilaa* dispute between Portugal and Germany in 1920s.⁷ The contemporary practice includes, for example, measures against nations that nationalise foreign assets without adequate compensation. The US's trade embargoes against Cuba provide a vivid case. In the *Tehran Hostages* case,⁸ the World Court never condemned the US's remedial actions of economic pressure in response to the Iranians' seizure and detention of US diplomats.⁹ Conversely, if a prior international delinquency against the claimant did not occur and thus damage its rights, then the measures taken by the State will not be regarded as legal

¹ See Elagab, *Non-forcible Counter-Measures*, at 3. Zoller, *Unilateral Remedies*, at 45.

² Reprisals are means that would be unlawful unless they are taken against the prior illegal act of the author State. The term has often been associated with measures involving the use of force. Zoller, *id.* at 35-44.

³ The measures refer to "nonperformance by the injured State of its obligations toward the offending state when such obligations correspond to or are directly connected with the obligations breached." See Henkin, *International Law*, at 570. Zoller, *id.* at 14-27.

⁴ Retortion is defined as an unfriendly, but lawful act taken against generally permissible measures, like suspending diplomatic relations. Zoller, *id.* at 5-13.

⁵ See the ILC's Draft articles on State Responsibility, Art. 47 (1) [hereinafter the ILC Draft articles], adopted by the International Law Commission on first reading. See The Report of the Commission on the work of its forty-eighth session, 1996, (Official Records of the General Assembly, Fifth-first Session, Supplement No. 10 (A/51/10)), at 144 [hereinafter 1996 ILC Rep.].

⁶ See the ILC Draft articles, Art. 30.

⁷ *Naulilaa case* (Portugal v. Germany), 1928, United Nations, Reports of International Arbitral Awards (UNRIAA), Vol. II, 1011 [hereinafter *Naulilaa case*].

⁸ *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (US v. Iran), ICJ Rep. 1980, at 3.

countermeasures.¹⁰ For instance, the act of reprisal by Libya against the United Kingdom (UK) in 1971 should be classified as unlawful because the UK's failure to prevent Iranian occupation of the islands in the Persian Gulf was not a breach of international law and not a delict against Libya.¹¹

Yet the use of bilateral remedies to enforce rules of law seems insufficient to accommodate the needs of the modern international society. The breach of certain international norms might be so comprehensive as to not only damage individual State, but also endanger the basic interests of the whole human community, such as grave violations of human rights. Therefore, there is an increasing demand for the recognition of a third State remedy, which, *inter alia*, may entitle every State to take countermeasures to secure the enforcement of the law, even if no tangible damage has been inflicted on the party seeking to take countermeasures.¹² The International Court of Justice (ICJ) in the *Barcelona Traction* case¹³ has confirmed the existence of certain global obligations *erga omnes* in which all States have a legal interest. Moreover, the ILC has been making a great effort to codify the law on countermeasures, which particularly covers third State enforcement by expanding the concept of an alleged "injured State".¹⁴

As indicated, the Pelly Amendment is enacted to enforce international environmental standards, especially those pertaining to the preservation of living resources. As the US had not been directly injured by Taiwan's insufficient progress on the protection of rhinos and tigers, it is interesting to explore whether the Pelly environmental embargo can be justified by the modern regime of third State countermeasures.

Firstly, there will be a basic discussion on the regime of third State countermeasures in order to identify its current status, possible scope and limitations. These general considerations are applicable to any situation in which a State that has not suffered a material injury nevertheless imposes countermeasures against a country that has allegedly breached international law. The chapter then explores the specific question, applicable in the Taiwan case, in which the alleged violation of law

⁹ *Id.* at 17-18, 28-29.

¹⁰ Bowett, "Economic Coercion", at 13; Schachter, *International Law*, at 171.

¹¹ See Bowett, *id.* at 9 and n. 37.

¹² See Charney, "Third State Remedies", at 59, 60-85.

¹³ *Barcelona Traction, Light and Power Co. Case, (Belgium v. Spain)*, ICJ Rep. 1970, at 3 [hereinafter *Barcelona Traction case*].

¹⁴ See the ILC's Draft articles, Art. 40

comprised a failure by a country to provide adequate protection to endangered species.

A The pros and cons of third state countermeasures

1 Arguments in favour of unilateral countermeasures

The following rationales have been advanced to support the right of third States to resort to countermeasures whenever an international offense damaging the common interests takes place.

(a) The reality of erga omnes obligations owed to the international community

The existence of several categories of fundamental international norms was strikingly endorsed in the *Barcelona Traction* case. The World Court explicitly distinguished "the obligations of the State towards the international community as a whole" from others, like norms of diplomatic protection by ruling that:

By their very nature the former are the concern of all States. In view of the importance of the rights involved, *all States can be held to have a legal interest in their protection*; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from *the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination*. Some of the corresponding rights of protection have entered into the body of general international law . . . ; others are conferred by international instruments of a universal or quasi-universal character.¹⁵

The doctrine of *erga omnes*¹⁶ then has been further illuminated in the recent ICJ's decisions, mainly on the protection of human rights. In the *East Timor* case¹⁷, the Court endorsed Portugal's assertion that the right of peoples to *self-determination* is an integral part of *erga omnes* norms, elaborating the scope of the doctrine.¹⁸ Also, the mandate of preventing and punishing the crime of genocide was affirmed as an *erga omnes* obligation in the *Bosnia case*.¹⁹

Although protection of the environment has not been explicitly referred as *erga omnes* obligations by the World Court, there is a general agreement among scholars

¹⁵ ICJ Rep. 1970, at 33 [emphasis added].

¹⁶ For a thorough analysis of the principle, see Ragazzi, *International Obligations Erga Omnes*.

¹⁷ *Case Concerning East Timor*, (Portugal v. Australia), ICJ Rep. 1995, at 90 [emphasis added].

¹⁸ *Id.* at 102, para. 29.

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections), ICJ Rep. 1996, at 595, para. 31.

that the doctrine should cover the protection of areas beyond national jurisdiction or global common spaces.²⁰ Further, on reviewing the separate opinion of Judge Weeramantry in the *Gabcikovo-Nagymaros Project* case,²¹ some argued that the concept of "sustainable development" might have achieved the status of an *erga omnes* obligation.²²

The recognition of *erga omnes* obligations could reasonably lead to certain legal consequences, mainly concerning the interest and standing of each State.²³ It has been proposed that the doctrine may have the possible implication of allowing any State to seek redress in judicial proceedings, analogous in effect to the *actio popularis*.²⁴ On the matter of securing effective enforcement, to some extent, the decision in the *Barcelona Traction* case may be reasonably read as allowing all States to take remedial action to enforce observance with certain fundamental norms.²⁵ Such an extended concept of "victim of the violation"²⁶ would automatically warrant every State's resorting to unilateral remedies, including countermeasures against offending States, even where the country acting has not sustained a direct injury. It might be

²⁰ E.g. Brownlie, "Environmental Protection", at 5; Schachter, *International Law*, at 381; Charney, "Environmental Damage", at 157, 166. Handl, "Territorial Sovereignty", at 58-72. Spinedi, "Convergences and Divergencies", at 248. See also Arangio-Ruiz, Fourth Report on State Responsibility Add. 1-3, *Yb. Of the ILC*, Vol. II, Part One (1992), at 44. Actually, the assertion that *erga omnes* obligations should extend to global common echoes the widely accepted principle that States have the responsibility to ensure that activities within their control do not cause damage to the areas beyond the limits of national jurisdiction. See The 1972 Stockholm Declaration on the Human Environment, Principle 21; The 1992 Rio Declaration on Environment and Development, Principle 2.

²¹ *Case concerning the Gabcikovo-Nagymaros Project*, (Slovakia Vs. Hungary), ICJ Rep. 1997, at 1.

²² See Boyle and Freestone, "Introduction", at 6.

²³ The recent ILC's discussion regarding *erga omnes* obligations indicated that the legal consequence of the doctrine may cover the right of any State: (a) to bring an action to protect a public or collective interest of the community which could result in a proliferation of legal actions and increase State reluctance to accept the jurisdiction of the International Court of Justice; (b) to assert a legal interest in vindicating the community or collective interest outside the judicial arena, for instance, in international forums; (c) to take countermeasures, unilaterally or jointly, against what they perceived to be the offending State or States; (d) in the absence of judicial control, to become a self-appointed policeman of international community; (e) to assert a claim for compensation without having suffered any material damage. See Report of the Commission on the work of its fifty session, 1998, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), para. 280 [hereinafter 1998 ILC Rep.].

²⁴ The notion of the *actio popularis* originates from Roman law, which enables any member to take legal action to protect a public or collective interest of the community, irrespective of being injured directly. See Schachter, *International Law*, at 209; Henkin, *International Law*, at 556-57. Charney, "Third States Remedy", at 66-75. But, it remains to be seen whether the acceptance of *erga omnes* norms must implies the recognition of a right of the *actio popularis*. See Schachter, *id.*; Henkin, *id.* The discussion of the origins of the doctrine see Meron, *Human Rights*, at 188-93. But, in the *South West Africa* case, the World Court tended to resist the application of this concept to international dispute. It noted that it "was not known to international law as it stands at present" and could not be deemed as "imported" by the general principles of law referred to in Art. 38 (1) (c). See ICJ Rep. 1966, at 47.

²⁵ See Charney, "Environmental Damage", at 154; Henkin *et al*, *International Law*, at 557.

argued that the concept of *erga omnes* obligations, without simultaneously according all States the right to vindicate serious offences, would fail to give effect to the legal principle embodied in the judgement of the Court.

(b) The insufficiency of bilateral and collective enforcement regime

Clearly, there is much evidence to indicate that the violations of *erga omnes* duties occasionally run beyond the domain of current bilateral and collective enforcement regimes. To enforce the common interests effectively, the unilateral remedy of countermeasure thus is able to fill the vacuum left by the above remedy regimes.

It is clear that some breaches of *erga omnes* obligations, such as genocide, do not necessarily inflict direct or tangible damage on any particular State. Moreover, the inability of an injured one to take remedial action may render the bilateral enforcement ineffective. Charney generally specifies three situations that may justify a third State remedy, whenever the remedy taken by a directly injured State proves unattainable:

One type of situation in which the need may arise is when *no directly injured state would have traditional standing to seek a remedy*. For example, this may be presented when a government commits genocide against its own nationals, or when damages are caused to common spaces outside of the jurisdiction of any state.

A second situation may be found even when there is a directly and severely injured state with a legal injury, but that state is incapable of seeking a remedy due to reasons beyond its control. This may take place, for example, in the case of aggression against a state which places the target state under the effective control of the aggressor.

In a third situation there may be directly injured states with the interest and ability to seek a remedy, but blatant and widespread violations of the law committed by a powerful state or group of states may have created a situation such that the injured states alone are not able to effectuate a remedy.²⁷

On the other hand, still, an accountable centralised authority has not yet been created in international society. It is also true that the present collective enforcement regime is not always satisfactory and effective, notwithstanding its generally impartial determination of an offence. The United Nations (UN) is the most prominent international institution concerned with the enforcement of international law. Yet its

²⁶ Schachter, *International Law*, at 196.

²⁷ Charney, "Third States Remedy", at 95-96 [emphasis added].

competence delegated by the UN Charter, even broad, is still limited.²⁸ Under the UN Charter, the violations of law to which it has authority to respond are confined to threats to the peace, breaches of the peace, and acts of aggression.²⁹ Admittedly, the recent practices of the UN have demonstrated its tendency to view gross violations of human rights, like genocide, a clear violation of *erga omnes* principle, as a threat to international peace and security, which may warrant enforcement by the institution.³⁰ The extensive interpretation of the UN mandate, however, cannot presently preserve all fields of essential interests of the international community.³¹ As a result, along with the continuing evolution of the fundamental community obligations, the limited function of the UN on the critical matters becomes even more apparent. To sum up, the inability of the UN system to address offences against the fundamental interests of international society strengthens the argument for resorting to unilateral countermeasures.

(c) Neighbourhood and friendship

Referring to the historical development of international society, Zoller maintains that the institutional attempt to limit the right of States to resort to unilateral countermeasures is inconsistent with one of the best-established principles of human society, namely friendship and neighbourhood.³² She stresses that States normally should be ready to help one another if external assistance is needed. The contention is based on the following observation:

In primitive society and thereafter in every form of civilization, it was widely recognized that on special occasions, during social emergencies, natural calamities or in case of urgent need, the individual household was assisted by the neighborhood. The neighbor is the typical helper. Hence neighborhood is brotherhood and friendship.³³

²⁸ See 1962 ICJ's advisory opinion on *Certain Expenses of the United Nations*. The Court states that "the purposes of the Organization are broad indeed, but neither they nor the powers conferred to effectuate them are limited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action." ICJ Rep. 1962, at 168.

²⁹ The UN Charter, article 39.

³⁰ During the past decades, there have been several UN Security Council resolutions responding to crimes against humanity. Responding to South Africa's policy of apartheid, since 1962, the UN organs had resolved to request trade embargo against the former. See UN G. A. Res. 1761 (1962); UN S.C. Res. 181 (1963), 182 (1963), 418 (1977). When genocide happened in former Yugoslavia and Rwanda, the Security Council also launched several enforcement actions, including economic sanctions against those countries. See UN S.C. Res. 808 (1993), 827 (1993) and 955 (1994).

³¹ See Zoller, *Unilateral Remedies*, at 111.

³² Zoller, *Unilateral Remedies*, at 114.

As a result, the acceptance of the legal capacity of a third State to resort to countermeasures certainly may facilitate and promote the requirement of neighbourhood. By the same token, it has been further argued by her that "[a]s long as countermeasures are primarily measures of law enforcement, it would be illogical to prevent a state from answering the call for help of a friend in need."³⁴

2 Arguments against unilateral countermeasures

Even accepting the basic concept of *erga omnes* obligations, there remains several hurdles that may prevent the regime, under the present legal wisdom, from achieving a well-accepted status.

(a) The danger of the abuse of rights

It is a common concern that unilateral taking of countermeasures with a view to enforcing *erga omnes* obligations by indirectly injured States is likely to be abused.³⁵ Given the indefinite content of *erga omnes* obligations,³⁶ some unilateral enforcement could be easily taken under the guise of preserving *erga omnes* value. Weil assumes that those fundamental interests of human society, though by quantity shall be small according to the World Court's contemplation, by nature may not be limited to the examples given by the Court.³⁷ He is concerned that "[w]e are once more faced with a category capable of an expansion all too likely to get out of hand."³⁸ As a result, a third State itself could interpret the concept deliberately in order to enforce the law in own interests.³⁹

Secondly, indeed, adequate control of international judicial or political organs over the third State enforcement has yet to be established either by treaty or customary law. If an impartial determination of the violations of *erga omnes* is unavailable, there is an inherent risk that the enforcement tool against grave breaches of common interests is likely to be randomly dominated by several powerful States

³³ *Id.*

³⁴ *Id.* at 115.

³⁵ Charney, "Third States Remedy", at 87; Zoller, *Unilateral Remedies*, at 117; Schachter, *International Law*, at 212.

³⁶ Schachter admits that "[i]ts precise scope and significance are still uncertain in State practice or judicial application," although he largely supports the remedy of third State aimed at promoting obedience to the important norms. See Schachter, *International law*, at 208-13.

³⁷ Weil, "Relative Normativity", at 432.

³⁸ *Id.*

³⁹ See Charney, "Third States Remedy", at 86; Zoller, *Unilateral Remedies*, at 115-16. Henkin *et al*, *International law*, at 578.

who tend to play the role of world police or prosecutors.⁴⁰ They may feel free to use their discretion to select the offending target. They also can determine what measures should be taken as well as whether the enforcement measures should be suspended. As Weil observes:

"[t]hat would mean that any state, in the name of higher values as determined by itself, could appoint itself the avenger of the international community. Thus, under the banner of law, chaos and violence would come to reign among states, and international law would turn on and rend itself with of loftiest of intentions."⁴¹

(b) *The conflict with the existing enforcement regime*

It is admitted that some international offences that result in direct damage to victim States may also constitute a violation of common interests and thus justify the third State remedy. The examples include acts of aggression or massive pollution of the atmosphere or of the sea. To a State which suffers tangible injury, the remedial actions taken by a third State may not be always supportive and welcome.⁴² As Charney concludes, "[t]hird state involvement may limit the directly injured state's options."⁴³ Furthermore, the bilateral remedy could be sufficient in redressing the offence without resorting to third State enforcement. That may thus render the third State remedy excessive.

The international institution's role in the enforcement of law, even if not exclusive, complete or always effective, is becoming increasingly important and aggressive. For example, in practice, the UN's collective enforcement has operated against acts of aggression, gross violations of human rights, like apartheid, and genocide, which literally amount to the violations of *erga omnes* obligations. If a third State remedy and a collective enforcement mechanism coexist,⁴⁴ the potential conflict between those enforcement regimes cannot be ignored. The unilateral one might also impede multilateral action. Therefore, it is highly desirable that some device be created aimed at harmonising the two systems.

⁴⁰ Henkin, *id.*

⁴¹ Weil, "Relative Normativity", at 433.

⁴² See Charney, "Third States Remedy", at 89-90.

⁴³ *Id.* at 90.

⁴⁴ Zoller, *Unilateral Remedy*, at 110. Under certain arrangement of treaty law, indeed, unilateral remedy is absorbed by legal competence of the institution. For instance, according to Art. 113 of the European Economic Community Treaty (1957), construed by the Court of Justice of the European Communities, the commercial policy as a whole has been transferred to the Community, which is now exclusively responsible for its implementation. See C.J.E.C. Aff. No. 41-76.

3 Concluding remarks

The existence of *erga omnes* obligations confirmed in the *Barcelona* case signifies the necessity of enforcing some inviolable norms by all States in the world. Theoretically, it is illogical to contend that the mandate does not have the effect of justifying the remedial actions taken unilaterally by all States. Although international institutions has already governed certain enforcement of law, it would seem that, as Zoller claims "there is no sound legal basis to systematically depriving third parties of a legal capacity to resort to measures . . ." ⁴⁵ Moreover, there is much evidence to support third State remedy in law, practice, and the literature. ⁴⁶

However, it is beyond doubt that the negative side effects and evident flaws embodied in current third State enforcement are indicative of the immaturity of the regime. In particular, it should be noted that no actual dispute concerning the unilateral action taken purporting to enforce *erga omnes* obligations has been brought before an international tribunal. ⁴⁷ So, it remains to be seen whether international tribunals will readily uphold the third State enforcement. ⁴⁸ To ensure the lawfulness of resorting to countermeasures by a third State, it becomes not only desirable but essential to foster favourable substantive and procedural limitations on the regime. In this regard, Riphagen pointed out the necessity of undertaking such measures by urging that the ILC should "take the greatest care, in devising the conditions of lawful resort to such actions, to ensure that the factual inequalities among States do not unduly operate to the advantage of the strong and rich over the weak and needy." ⁴⁹ Recently, the Special Rapporteur of the ILC has noted the problem of taking unilateral countermeasures without any form of control, mentioning the necessity of finding a solution to the massive procedural difficulties. ⁵⁰

B The limitations on the application of third State enforcement

1 The proposal of collective enforcement actions

As mentioned, there is an inherent danger that unilateral remedial actions will be abused in the absence of proper institutional control. To thwart such undesirable

⁴⁵ Zoller, *id.* at 117.

⁴⁶ See generally Charney, "Third States Remedy", at 59-86.

⁴⁷ See Henkin *et al*, *International Law*, at 556; Schachter, *International Law*, at 197.

⁴⁸ Charney, "Third States Remedy", at 75.

⁴⁹ 1991 ILC Rep. at 327; A writer also shares the same concern. See Charney, *id.* at 59.

effect, it may be argued that the enforcement of *erga omnes* obligations be performed within the framework of international institutions rather than unilaterally.⁵¹ In effect, States should refrain from resorting to countermeasures unless a collective decision by the international community to authorise the third State actions has been made in response to an international offence.⁵² The proposition is based on the belief that the regime, as Schachter perceives, if functioning well, may produce "a well-founded judgement based on a full and unbiased inquiry into the alleged violation", which "could provide a credible basis for third States to take supportive action."⁵³

Indeed, the proposal had been considered in the previous ILC's work on the draft of State Responsibility. It was argued there that the violation of *erga omnes* obligations, which is deemed "an offence against all the members of the international community. . .", has led the latter:

[t]o turn towards a system which vests in international institutions other than States exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented.⁵⁴

As a result, collective decision had been considered a condition for taking unilateral countermeasures in the ILC's Draft articles where international crimes, violations of multilateral treaties, and objective regimes are committed.⁵⁵

Unfortunately, the proposal to allow the international institutions to govern the third State remedy completely proves impractical and not feasible under the current international legal regimes. Ideally, effective collective enforcement must rely on centralised efficient international institutions vested with comprehensive authority to deter all potential offences against the fundamental interests of human society. In short, only a form of *world government* can possibly achieve such a goal.⁵⁶ The reality is, however, at present, that such a forum has not yet been created. For instance, it is true the competence of bodies within the UN to address the violation of important norms appears broad. Yet, as indicated, they have not yet been vested with

⁵⁰ 1998 ILC Rep. at 324.

⁵¹ See Henkin *et al*, *International Law*, at 559; Charney, "Third States Remedy", at 91.

⁵² See Charney, *id.* at 91.

⁵³ Schachter, *International Law*, at 197.

⁵⁴ Y. B. of ILC 1979, Vol. II, Part 2, sub-para. (12), at 119.

⁵⁵ See 1985 Draft articles on State Responsibility, Art. 10 and 11; Y. B. of ILC 1976, Part 2, sub-para. 115, at 22.

⁵⁶ See Zoller, *Unilateral Remedy*, at 118 [emphasis added].

the prerogative to respond to all the breaches of *orga omnes* obligations. Their powers are limited by the mandate of the UN Charter and not *exclusive*. In addition, their performance is not always satisfactory. On the other hand, it is doubtful whether a powerful central authority is likely to be entirely acceptable to the international community.⁵⁷

Actually, the proposal that third State remedies should be confined to a collective regime was not adopted in the present ILC draft. The arrangement does not imply that any States may feel free to resort to unilateral countermeasures without incurring the consequence that their actions could be unlawful. Rather, as the commentary of the draft states:

While this does not necessarily require a definitive third party determination of the existence of such an act, a mere good faith belief on the part of the injured State which turns out not to be well-founded would not be sufficient to justify the taking of countermeasures. Thus, an injured State which resorts to countermeasures based on its unilateral assessment of the situation does so *at its own risk* and may incur responsibility for an unlawful act in the event of an incorrect assessment.⁵⁸

Although the proposal of collective enforcement seems not so prevalent and achievable at the present stage of development of international law, international society should not relinquish any efforts to eliminate the flaws resulting from the deliberate use of the third State remedy. It is not unlikely that the UN may eventually turn out to be a centralised institution, which is able to coordinate and control third State enforcement actions, if a consensus to that effect on the revision of the Charter is reached. Until then, third State remedies may still be permitted to run independently of the collective one.

2 The relationship between third State and existing collective enforcement

As individual remedies for securing compliance with international law run parallel with those of the collective regime, the necessity of reconciling the possible conflict between their respective operation increases especially where the latter has been positively involved in enforcement action.

One solution is to confirm the superior status of the collective enforcement. As an international offence arises, normally, a collective determination of the breach of

⁵⁷ Schachter, *International Law*, at 167.

⁵⁸ 1996 ILC Rep. at 155 [emphasis added].

an obligation is fairer and more creditable than individual judgement. Support for the superiority of collective enforcement is argued on the basis that the former may incline to produce a better outcome and may deter abuses of third State remedies as well. It has been observed that:

International organizations may, however, exert significant and desirable influence on a violator and may help to shape the remedial efforts even in the absence of the authority to issue compelling orders. In general, a *first resort* to an appropriate international forum places community restraints on abuses of significant third state remedies and on potential violators when a remedy by the directly injured state is unavailable.⁵⁹

But, it remains controversial whether the requirement that a third State seeking to apply a remedy should seek a collective enforcement mechanism as a first resort has been well established under customary international law.⁶⁰ The support for according international institutions superior status regarding law enforcement, however, can be found in the relevant judgements. In the *Nicaragua* case, the ICJ dealt with whether Nicaragua's human rights record might legally warrant countermeasures by the US.⁶¹ On the enforcement of human rights compliance, the Court obviously preferred the collective enforcement embodied in the competent international institution to the unilateral one. The Court noted that the Organisation of American States (OAS) is entitled to monitor Nicaragua's observance of the human rights convention binding on it.⁶² In particular, it stressed that the mechanisms in the Inter-American Commission on Human Rights *have functioned*, because the Commission:

[i]n fact took action and compiled two reports (OEA/Ser.L/V/II.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.⁶³

As a result, it considered that those measures taken by the US, such as the mining of ports, the destruction of oil installations, were not the appropriate methods to monitor or ensure respect for human rights in Nicaragua.⁶⁴ The ruling has therefore confirmed the priority of relying on collective efforts for law enforcement. Moreover, in the light

⁵⁹ Charney, "Third States Remedy", at 97 [emphasis added].

⁶⁰ One opposes a first resort to international institutions as a precondition for third State remedy. See, Zoller, *Unilateral Remedy*, at 119.

⁶¹ ICJ Rep. 1986, at 130, para. 257.

⁶² *Id.* at 134, para. 267. The convention ratified by Nicaragua is the "American Convention on Human Rights" (the Pact of San Jose, Costa Rica).

⁶³ *Id.* at 134, para. 267 [emphasis added]

of the Court's decision, the characterisation of the unilateral remedy as a last resort probably would not be an unreasonable conclusion. It thus suggests that individual actions only are permissible if a competent international mechanism is unavailable, or if it is functioning ineffectively.⁶⁵ Admittedly, however, the requirement that a third State should honour collective regimes as the first resort still needs further confirmation by subsequent legislative and judicial efforts.

In fact, the ILC is aware of the potential conflict between the draft articles on State Responsibility and the UN Charter. Pursuant to the mandate of the Charter, the provisions of the Charter prevail over any other international agreements.⁶⁶ As a result, once an offence that may trigger a third State remedy in accordance with the draft convention and the Security Council enforcement measures as well, theoretically, the former could be overridden by decisions of the Council.⁶⁷ Reflecting the concern on the relationship between the draft treaty with the Charter, the ILC draft simply provides:

The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.⁶⁸

However, the provision seems unable to provide a sound basis on which to solve the conflict between the two international regimes. It is doubtful whether the Security Council has the prerogative to deny a State's right to take countermeasures.⁶⁹ Actually, it has been argued that there is no legal basis in the Charter to deprive a State of its fundamental legal rights, such as remedial actions.⁷⁰ Nevertheless, it may be justified if the Council might call on a *suspension* of the exercise of the rights as a provisional measure authorised by Article 40 of the Charter.⁷¹ In contrast, in the ILC's community, a different view was presented in order to preserve the integrity of the right of the State, considering the above approach "as too restrictive, too "legalistic", and as minimizing the overriding interest of the entire community of the

⁶⁴ *Id.* at 134, para. 268.

⁶⁵ See Zoller, *Unilateral Remedy*, at 72.

⁶⁶ The UN Charter, Art. 103.

⁶⁷ 1996 ILC Rep. at 139.

⁶⁸ The ILC Draft articles, Art. 39.

⁶⁹ 1996 ILC Rep. at 139.

⁷⁰ *Id.* See also Zoller, *Unilateral Remedy*, at 117.

⁷¹ 1996 ILC Rep. at 139, n.226 [emphasis added].

States in preserving international peace."⁷²

Faced with this dilemma, the ILC noted that such provision in the draft could not resolve this question thoroughly, and decided that it would consider the issue in the light of comments by States.⁷³ Moreover, in recent ILC discussions, a view has been put forward in favour of a more constrained role for unilateral actions taken against grave offences of community interests, wherever a comprehensive special regime governing the specified violations is available.⁷⁴ The ILC was therefore urged to "adopt a cautious approach that would ensure the residual or supplementary nature of the future system of legal consequence to breaches of community obligations that were covered by specific regimes."⁷⁵

Overall, the increasing trend is to uphold the supremacy of collective enforcement regimes over the individual third State remedy, even though it has not yet been totally confirmed in international law. Perhaps nations who uphold the integrity of unilateral enforcement will continue to resist such arrangement.

3 Material limitation on unilateral countermeasures

There is general consensus that principles of *necessity* and *proportionality* are essential criteria designed to limit countermeasures.⁷⁶ In fact, the ILC draft article has largely codified such principles to circumscribe the use of countermeasures.

(a) Necessity

Admittedly, a violation of law could be excused if it was committed within the motive of self-preservation, like self-defence or self-help. But, it has also been required that such countermeasures be necessary.⁷⁷ Consequently, an act of reprisal, an inherently wrongful act, which is based on the principle of self-help, must meet the criterion of necessity to be lawful.

In practice, then, the criterion of necessity is required before an action can be classified as a legal countermeasure. For instance, the law formulated by the American Law Institute refers to "unilateral remedies" as "measures [are] *necessary* to terminate the violation or prevent further violation, or to remedy the violation. . ."⁷⁸

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 1998 ILC Rep. at 287.

⁷⁵ *Id.*

⁷⁶ Bowett, "Economic Coercion," at 9-10.

⁷⁷ Oppenheim, *International Law*, at 298-90; ICJ Rep.1986, at 122, paras. 237.

⁷⁸ Restatement (Third) of the Foreign Relations Law of the United States, 905 Unilateral remedies (1)

Similarly, the ILC draft aims to codify the concept of necessity to circumscribe the entitlement of the injured State to take countermeasures. It requires that measures be necessary to induce the compliance of the violator with its obligations, namely cessation of the wrongful conduct and *reparation*.⁷⁹ Those drafters believe that the term "as necessary" performs a dual function:

It makes it clear that countermeasures may be applied only as a *last resort* where other means not involving non-compliance with the injured State's obligations have failed or would clearly be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicates that the decision of the injured State to resort to countermeasures is to be made *reasonably* and *in good faith*, and *its own risk*.⁸⁰

Moreover, the draft provides that the measures must be taken as necessary in the light of the violator's response to the demands of the injured State.⁸¹ It has been stressed that "it is reasonable to expect that in devising its reaction the injured State should take account of the manner in which the wrongdoing State is responding to the injured State's demands for cessation and reparation."⁸² In short, the device of the draft compels the acting State to undertake the risk that the means used might be illegal if the reaction of the target has not been considered carefully. According to the commentary of the ILC Report, the requirement is devised to strike a proper balance between the position of the injured State and that of the wrongdoing State and is based on that the necessity of countermeasures diminishes in inverse proportion to the achievement of their legitimate aims. Thus, the draft demands that it be incumbent on the injured State to assess the continuing necessity of the countermeasures in the light of the wrongdoing State's response to its demands.⁸³

The dynamic requirement of obliging the injured State to be cautious and ready to abort or adjust the means, depending on the response of the violator, seems a novel idea. As a mechanism to constrain the deliberate use of unilateral remedies, the principle of necessity should also apply to third State's countermeasures. Nonetheless, the difficulty of assessing accurately whether necessity is present in the changing and unpredictable international relationships remains. It is desirable that certain detailed

(a) [hereinafter US Restatement (Third)][emphasis added].

⁷⁹ The ILC Draft articles, Art. 47 (1).

⁸⁰ 1996 ILC Rep. at 156 [emphasis added].

⁸¹ The ILC Draft articles, Art. 47 (1).

⁸² 1996 ILC Rep. at 157.

⁸³ See *id.* at 157-58.

standards should be developed in dealing with the use of the third State remedy.

(b) Proportionality

The principle of proportionality originates from European administration law. It was initially designed to ensure that the restrictions imposed by police authorities on civil rights were not disproportionate to the purpose of maintaining public order.⁸⁴ In the international arena, the principle was first introduced into the dispute involving acts of reprisals by Germany in the *Naulilaa Incident* case, which required a proportionate response to the alleged wrongful act.⁸⁵ The need for proportionality between the prior breach and the latter measure of response has been further elaborated in the *US/France Air Service Agreement* dispute.⁸⁶ In this case, where the term, "countermeasures", was first used, proportionality was interpreted and applied to secure equivalence between the offender and the injured party. The Arbitral Tribunal remarked that:

It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; it is a well-known rule. . .[i]t is necessary to carefully to assess the meaning of counter-measures in the framework of proportionality. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution.⁸⁷

Inspired by the ruling, Zoller emphasised that the principle not only aims at pursuing the re-establishment of "equivalence between parties", but should also operate primarily between the effect of countermeasures and the purpose aimed to reach (the compliance with international obligations).⁸⁸

In practice, the difficulty may arise in the precise evaluation of the alleged equivalence of countermeasures with a wrongful act. Qualitative as well as quantitative criteria have been often employed.⁸⁹ For example, the ILC's draft on State responsibility regarding the principle of proportionality incorporates both quantitative standards (the effects of the breach) and qualitative ones (the gravity of

⁸⁴ See Zoller, *Unilateral Remedies*, at 134-35; *id.* *Enforcing Law*, at 147-48.

⁸⁵ *Naulilaa* case, UNRIAA, Vol. II, 1025-26.

⁸⁶ *Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, 9 Dec. 1978, UNRIAA, Vol. XVIII, at 443.

⁸⁷ *Id.* at 443-46.

⁸⁸ Zoller, *Enforcing Law*, at 60.

⁸⁹ See Annacker, "State Responsibility", at 244-45; Chazournes, "Economic Countermeasures", at 339.

the wrongful act). In a negative formulation of the principle,⁹⁰ Article 49 of the draft reads as: "Countermeasures taken by an injured State shall not be out of proportion to the *degree of gravity of the internationally wrongful act* and the *effects thereof on the injured State*." The US Restatement took a similar approach, requiring a legal countermeasure not to be out of proportion to the *violation* and the *injury suffered*.⁹¹ As a result, this approach has influenced some judgements in international tribunals. In the *Gabcikovo-Nagymaros* project case, the ICJ took the quantitative criteria in considering whether the countermeasure taken by Czechoslovakia (unilaterally assuming control of a shared water resource) met the requirement of proportionality. The Court found that the measures failed to do so mainly because the effects of the countermeasures (depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube) cannot be commensurate with the injury Czechoslovakia suffered.⁹²

While the test of proportionality specified by the ILC proves increasingly dominant, it can be difficult to apply to the countermeasures invoked by third State against the violations of fundamental community interests, because the responders arguably suffer no material damage. Thus, the test of seeking equivalence between parties could hardly be applicable to the enforcement of common value.

Zoller's classification of the proportionality on the relations between ends and means may probably provide a solution.⁹³ What is required is that remedial actions should not bring about disproportionate effects with respect to the purpose pursued, namely to halt the violation or deter future offences. Moreover, since each State is presumably entitled to resort unilaterally to countermeasures in response to the breach of *erga omnes* obligations, it has been observed that only one single reaction qualifying the proportionality criteria indicated above is not enough. Rather, all reactions taken together must not be disproportionate to the offence.⁹⁴ As a result, as Annacker concludes, "Unilateral reactions are only permissible as long as and to the extent that preceding reactions still allow proportionate reactions."⁹⁵

It remains to be seen whether the above approaches, although theoretically feasible, would win universal support. Nevertheless, it seems clear that the current

⁹⁰ Annacker, *id.* at 245.

⁹¹ US Restatement (Third), at 905 (1) (b).

⁹² ICJ Rep. 1997, at 46-48, para. 85.

⁹³ Zoller, *Enforcing Law*, at 60.

⁹⁴ *Arangio-Ruiz*, Fourth Report, A/CN.4/444, 25 May 1992, Add. 1, 31 para. 93.

ILC's draft regarding proportionality is not satisfactory in dealing with third-State countermeasures. Perhaps the work needs to be further elaborated in a way that may effectively cope with the particular situation of the unilateral enforcement of fundamental international norms.

(c) Other constraints on unilateral countermeasures

There are certain essential values in international society that are considered inviolable, such as sovereignty, human rights, and the prerogative of diplomacy. Accordingly, it is increasingly demanded that the injured State refrain from resorting to certain undesirable measures, even if the actions meet the above requirements. The ILC draft establishes several categories of unlawful countermeasures. They include:

- (a) the threat or use of force as prohibited by the Charter of the United Nations;
- (b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;
- (c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents,
- (d) any other conduct in contravention of a peremptory norm of general international law⁹⁶

The draft's designated requirements aim at deterring the abuse of the right to take countermeasures. It has been seriously questioned, however, whether the approach entirely reflects customary international law.⁹⁷ Perhaps one of the most problematical restraints is sub-paragraph (b). The prohibition leaves much room for debate. First of all, the text draws much criticism because of the vagueness of its terms. The words "extreme" and "economic or political coercion" are not well defined. Secondly, there is a concern that extensive application of the provision is likely to render virtually all the countermeasures impermissible.⁹⁸

Indeed, the provision largely echoes the principle of sovereignty and non-intervention as enunciated in numerous UN Declarations and Resolutions.⁹⁹ The inclusion of the general concern about the frequent use of non-military coercion in the draft is an indication of the ILC's intention to reconcile the conflict between the principle of non-intervention and the entitlement of taking countermeasures. Acknowledging the admissibility of taking countermeasures against international

⁹⁵ Annacker, "State Responsibility", at 245.

⁹⁶ The ILC Draft articles, Art. 50.

⁹⁷ The USs comment, at 474.

⁹⁸ In Henkin's words, the device probably would "effectively eliminate virtually all countermeasures. Henkin *et al*, *International law*, at 572.



wrongful acts, Arangio-Ruiz, the former ILC's Special Rapporteur, nevertheless observes:

Although the State practice considered does not appear to warrant the conclusion that certain forms of economic and/or political coercion are equivalent to forms of armed aggression, such practice none the less reveals a trend towards the prohibition of economic or political measures which jeopardize the territorial integrity or the political independence of the State against which they are taken.¹⁰⁰

As far as enforcement against violations of *erga omnes* obligations is concerned, the aim of taking a countermeasure is largely to bring the offence to an end. As a result, it becomes an inevitable effect that, by and large, it will affect the alleged "political independence" of the violators. So, the above requirement seems to be paradoxical. On the other hand, however, it should be noted that, as indicated in the latter chapter, intervention may be justified, if the matters intervened fall outside of national discretion. In a sense, a lawful third State's countermeasure will not violate the principle of non-intervention, because that principle is not designed to permit States to violate *erga omnes* obligations. It is true that the World Court, in the *Nicaragua* case, has, to some degree, contributed to the reconciliation between two regimes. Nonetheless, it remains too soon to say that the ILC article constitutes an excessive prohibition. It is uncertain to what extent the provision would be eventually accepted, modified, or rejected. However, the device has shown the necessity to strike a balance between the sovereign right to decide national conduct freely and the right to enforce important norms by taking countermeasures.

C The enforcement of environmental obligations by third States

The role of *erga omnes* obligations in the protection of the international environment has become increasingly significant because certain serious environmental offenses by nature would not cause direct injury to a particular State, such as massive pollution to the areas of international common space beyond the limits of national jurisdiction.¹⁰¹ Thus, as observed, in this situation, "If a particular injury were required, no State would have standing to remedy the violation."¹⁰²

⁹⁹ See the discussion in chapter three.

¹⁰⁰ Arangio-Ruiz, "Fourth Report on State Responsibility Add. 1-3", Y.B. of the ILC, Vol. II, Part One (1992), at 30.

¹⁰¹ See *id.* at 157.

¹⁰² *Id.*

It is admitted that the overall pattern of how the *erga omnes* doctrine is applied to the enforcement of international environmental norms is far from clear. As a result, it remains disputable what violations of environmental obligations may entitle every State, whether or not directly injured, to take remedial action, including unilateral sanctions of countermeasures in vindication of the offence.¹⁰³ This section aims to examine what sort of circumstances are currently likely to justify third State countermeasures employed to protect the general community interests concerning the global environment. The work mainly seeks to reveal the implications of the ILC's Draft on State responsibility with respect to the unilateral enforcement of environmental norms, and the following discussion perhaps may help clarify the unsettled issues.

1 The nuclear tests cases

In the 1974 *Nuclear Tests* cases,¹⁰⁴ the complaints made by Australia and New Zealand against French atmospheric nuclear testing in the South Pacific might have been an occasion on which the ICJ could apply the concept of *erga omnes* to the dispute triggered by environmental concern.

It is true that the conduct of the French did not breach international treaty law on the ban on nuclear tests, because France was not a contracting party to the 1963 Nuclear Test Ban Treaty, and arguably the prohibition of nuclear test emanating from that treaty did not constitute a customary rule binding all States.¹⁰⁵ Nonetheless, it aroused debate as to whether France was permitted to perform nuclear tests on the high seas, which could presumably cause environmental damage to alleged global commons. In other words, it is interesting to explore whether the French conduct was contrary to *erga omnes* obligations to the extent that Australia and New Zealand, *inter alia*, were entitled to bring a claim to the Court on behalf of the international community, acting as *actio popularis*.

Australia and New Zealand both argued that the duty to refrain from conducting atmospheric nuclear tests was owed *erga omnes*.¹⁰⁶ In particular, New Zealand claimed: (a) that the examples of circumstances in which *erga omnes* obligations

¹⁰³ See Bilder, "Unilateral State Action", at 73; Sands, *Principles*, at 151.

¹⁰⁴ *Nuclear Tests* case (Australia v. France); (New Zealand v. France), ICJ Rep. 1974.

¹⁰⁵ See Shaw, *International Law*, at 419.

¹⁰⁶ See *Nuclear Tests* cases (Australia v. France) I ICJ Pleadings, at 326-35.

existed, given in the *Barcelona Traction* case, were not exhaustive;¹⁰⁷ (b) that customary international law, as well as treaty law, might give rise to obligations *erga omnes*;¹⁰⁸ (c) that a fundamental characteristic of *erga omnes* obligations is that - their violation "can fairly be said to be an affront to the conscience of mankind".¹⁰⁹

Regrettably, the World Court overlooked the substantive legal issue raised by the plaintiffs concerning the violation of freedom of the high seas by the nuclear testing. Rather, it decided not to judge the claims on the ground that a French undertaking to discontinue any further atmospheric nuclear tests in a form of unilateral statement was binding.¹¹⁰ The Court thereby missed a chance to clarify the implication of *erga omnes* for the protection of common areas, such as the high seas. As Birnie and Boyle indicate, "[t]he ICJ was unsympathetic to the notion of an *actio popularis* allowing high seas freedom to be enforced as obligations 'erga omnes', and it did not follow its earlier dicta."¹¹¹

It is important to note, however, that the Joint Dissenting Opinion in the *Nuclear Tests* cases recognised, by referring to the *Barcelona Traction* case, the specific value in considering the legal argument in the present dispute. Judges Onyeama, Dillard, Jimenez de Arechega and Sir Humphrey Waldock contended:

If the materials adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests [in the common areas], the Court would at the same time have to determine what is the precise character and content of that rule and, in particular, whether it confers a right on every state individually to prosecute a claim to secure respect for the rule. In short, the question of 'legal interest' cannot be separated from the substantive legal issue of the existence and scope of the alleged rule of customary international law. Although we recognise that the existence of a so-called *actio popularis* is a matter of controversy, the observations of this Court in the *Barcelona Traction, Light and Power Company, Limited* Case suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.¹¹²

¹⁰⁷ *Nuclear Tests* cases (New Zealand v. France) II ICJ Pleadings, at 207.

¹⁰⁸ *Id.* at 207-8.

¹⁰⁹ *Id.* at 208.

¹¹⁰ ICJ Rep. 1974, at 253, 305-06.

¹¹¹ Birnie and Boyle, *International Law and Environment*, at 155. Although the Court did not confirm the standing of State to bring claims in the name of protecting community interests, Birnie and Boyle seem to suggest that the Court would allow States to engage in diplomatic protests and to apply countermeasures. They mentioned that "... in some cases the protection of community interests will involve no more than the right to make diplomatic protests and apply lawful sanctions, such as a refusal of access to fish stocks or an embargo on trade. See *id.* at 157.

¹¹² ICJ Rep. 1974, at 369-70.

In short, despite the Court's hesitation to incorporate essential environmental concern into the category of *erga omnes* obligations, undoubtedly, the initial effort made by the ICJ in defining the concept shall not become the final chapter for the Court to pay due regard to the increasing importance of protecting the common values of the international community.

2 The ILC's position on the unilateral enforcement of environmental obligations

(a) Basic provision

This section focuses mainly on the Draft articles on State responsibility articulated by the ILC,¹¹³ because the draft appears to be the most extensive and supportive work on the elaboration of third State remedies put into the context of countermeasures. In an effort to assimilate the concept of third State enforcement into the regime of State responsibility, the draft adopts an extensive definition of "injured State".¹¹⁴ In this regard, any State or States whose rights or interests are infringed by the breach of obligations specified in the draft may be deemed an "injured" State, and be thus entitled to claim remedies by taking countermeasures, whether or not direct injury is sustained. The formulation is designed to make the third State enforcement regime consistent with the conventional mandate requiring a display of injury in order to vindicate the offence unilaterally.¹¹⁵

Article 40 of the draft defines the meaning of "injured State" in a very broad sense. It specifies a number of categories in which certain violations of norms may allow some subjects or States to be legally regarded as an "injured" State or States.¹¹⁶ In the beginning, the draft defines the "injured State" as one party to a bilateral treaty,¹¹⁷ party or parties to binding decisions of a international court or tribunal and of international institutions,¹¹⁸ as well as a third party that enjoys the benefit arising

¹¹³ Since 1949, the ILC has been working on the codification of "State Responsibility", including countermeasures for decades. At its 2473rd meeting, on 26 July 1996, the ILC decided to transmit the "Draft articles on State responsibility", through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998. See 1996 ILC Rep. at 121, 124.

¹¹⁴ See Schachter, *International Law*, at 196; Henkin *et al*, *International Law*, at 557.

¹¹⁵ Some writers strongly advocate the requirement of injury as the very basis for seeking redress. *E.g.* see De Arechaga and Tanzi, "International State Responsibility", at 349.

¹¹⁶ Y.B. of ILC 1985, Vol. II (Part Two), at 26.

¹¹⁷ The ILC Draft articles, Art. 40 (2) (a).

¹¹⁸ *Id.* Art. 40 (2) (b) (c).

from a treaty.¹¹⁹ The structure of those provisions simply is in conformity with the strict concept of injured State arising from the bilateral legal relationship. Hence, little doubt has been raised upon this arrangement.

(b) Enforcement of general multilateral treaty

However, in subsequent paragraphs, the article's intention of expanding third State remedies to cover the enforcement of multilateral treaties and customary international law proves an innovative work and consequently draws intense debate. The article specifies that "the infringement of the right necessarily affects the enjoyment of the rights or the performance of the obligations. . ." entails that the remedial actions be taken by any State which is party to the treaty or bound by the relevant rule of customary law.¹²⁰ Since the obligations in a multilateral treaty subsist in all parties, Schachter favours the provision, arguing that every party may have a legal interest in their compliance.¹²¹ Although the adoption of the ILC provision may, at least theoretically, further the effective implementation of the law, it seems that the category does not necessarily carry the implication of *erga omnes*.¹²² Besides, the drafter of the article had noted that, within the context of the provision, no substantive right under customary law may permit a third State to enforce a rule *erga omnes*.¹²³ Accordingly, it may be concluded that the provision is merely a matter of treaty norm as formulated by the ILC.

In addition to the provision's departure from the *erga omnes* obligations, it is doubtful in practice that such a broad recognition of third State enforcement of the treaty regime would be widely accepted. First of all, it is necessary to clarify its relation to the similar device in the Vienna Convention on the Law of the Treaties.¹²⁴ The Convention does stipulate certain rules regarding the consequences of "a material breach of a multilateral treaty by one of the parties."¹²⁵ Some countries criticise the failure of the ILC draft to decide whether such "infringements of right" are identical

¹¹⁹ *Id.* Art. 40 (2) (d).

¹²⁰ *Id.* Art. 40 (2) (e) (ii).

¹²¹ Schachter, *International Law*, at 209-10.

¹²² *E.g.* Henkin *et al*, *International Law*, at 557. *Cf.* Annacker, "State Responsibility", at 214.

¹²³ The Special Rapporteur stated that "[I]t would seem that, beyond the case of international crimes, there are no internationally wrongful acts having an *erga omnes* character." See *Fourth Report on the Content Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, Y.B. of ILC 1985, Vol. II (Part Two), at 13.

¹²⁴ U.N. Doc. A/CONF. 39/27 (1969), 1155 U.N.T.S. 336, signed at Vienna 23 May 1969; entered into force 27 Jan. 1980 [hereinafter Vienna Convention].

¹²⁵ Article 60(2)(c) of the Vienna Convention.

to "material breaches" of a treaty.¹²⁶ Where the concepts of "infringed right" and "material breach" overlap, it has been suggested that the draft should add "the Vienna Convention would govern interpretations of specific treaty regimes injured therein."¹²⁷ Yet, despite the potential conflict between these two regimes, it needs to be borne in mind that they actually operate with different purposes. The provision of the ILC draft is concerned with the implementation of State responsibility by recognising the right of a third State to seek a remedy, which mainly aims to deter the breach of norms. On the other hand, as observed, "measures (termination or suspension of the operation of a treaty) under Article 60 (Vienna Convention) are intended to protect a State from the disadvantages of non-fulfilment by the other party."¹²⁸ Overall, in order to ensure the compatibility of the draft with the other regimes, it is highly desirable for the ILC to commit itself to the further elaboration of this issue.

On the enforcement of international environmental agreements and rules, the ILC's draft article indicated above, will undoubtedly help to promote compliance with environmental obligations by granting those "injured States" the right to respond to such offense.

(c) Enforcement of collective interests

In addition, the following categories of the ILC draft article may be deemed consistent with the *erga omnes* obligations concerning environmental matters. The draft article 40(2)(f) specifically deals with the safeguard of certain regimes designed to secure "collective interests." It considers that all parties to a multilateral treaty are injured if a breach of the treaty affects the "collective interest," which has been *expressly stipulated* in that treaty.¹²⁹ Accordingly, third State enforcement in this area is designed to deal with a regime of multilateral treaties where an explicit stipulation for the protection of collective interests emerges.¹³⁰ Though the rule is ostensibly confined to treaty regime, it should be noted that the configuration shall not be read as excluding the rules of customary international law which also achieve the same effect.¹³¹ In short, the provision may be deemed to be a sub-category of the

¹²⁶ "The United States' comment on the draft articles on State Responsibility", 22 Oct. 1997, 37 *ILM* 483 (1998)[hereinafter the US comment].

¹²⁷ *Id.*

¹²⁸ Annacker, "State Responsibility," at 215.

¹²⁹ See the ILC Draft articles, Art. 40(2)(f) [emphasis added].

¹³⁰ *Id.*

¹³¹ See Y. B. of ILC 1985, Vol. II, Part 2, sub-para. (25), at 27.

enforcement of the general multilateral treaty.¹³² But, on the other hand, its genuine advocacy of remedy for violation of well-defined common interests renders it coherent with the doctrine of *erga omnes* obligations, and thus more acceptable to the international community.¹³³

As far as the scope of the term "collective interests" in Article 40 (2) is concerned, the drafters of the ILC noted that, in the present stage of development of the international community, the application of such a mandate is still limited.¹³⁴ The doctrine of the "*common heritage of mankind*" applied to depict the legal status of the mineral resources of the deep sea-bed and subsoil beyond national jurisdictions in the Law of Sea Convention has been generally regarded as a right model for the protection of collective interests.¹³⁵ Other regimes for the candidate have been considered by the ILC, but the records show that no agreement has been reached with respect to their precise application.¹³⁶

Apart from the deep sea bed regime, there seems no definite answer regarding which environmental regimes may fit the definition of collective interests. In recent decades, however, a growing number of multilateral treaties have emerged aimed at protecting the global environment and areas of *common interests* or *concern*, which, *inter alia*, cover the areas of ozone, global climate, sea area, Antarctica, movement of hazardous wastes, and world heritage.¹³⁷ Birnie and Boyle consider that all parties to those multilateral treaties have "collective interests" in their enforcement.¹³⁸ The problem is that the concept of "common concern" and related terms, which imply the protection of collective interests, has not generally been *explicitly specified* in those treaties, but simply mentioned in the preamble of them.¹³⁹ As a result, applying the

¹³² See Annacker, "State Responsibility", at 215.

¹³³ See Henkin *et al*, *International Law*, at 557.

¹³⁴ See Y. B. of ILC 1985, Vol. II, Part 2, sub-para. (24), at 27.

¹³⁵ See Y. B. of ILC 1985, Vol. II, Part 2, sub-para. (23), at 27. The Convention provides that "the Area and its resources are the Common Heritage of Mankind," and that "all rights in the resources of the Area are vested in mankind as a whole. . ." The UN Convention on the Law of the Sea, 10 Dec. 1982, in force 16 Nov. 1994. See UN Doc. A/CONF. 62/122, part XI, Art. 137, 137(2).

¹³⁶ Charney, "Third States Remedy", at 81.

¹³⁷ For instance, the Ozone Convention, the London Dumping Convention, the Antarctic Mineral Resources Convention, the Convention for Control of Transboundary Movements of Hazardous Wastes, the World Heritage Convention. See Birnie and Boyle, *International law and Environment*, at 156; Sands, *Principles*, 153, 218-19.

¹³⁸ Birnie and Boyle, *id.* at 156.

¹³⁹ Sands, *Principles*, at 218 and n. 224-32. Generally speaking, the legal function of preambles is to serve an interpretative guideline for the provisions of the agreement. See *Asylum*, I.C.J. Rep. 1950, at 282; *Rights of Nationals of the United States of American in Morocco*, I.C.J. Rep. 1952, at 196; The Vienna Convention on the Law of Treaties, Art. 31 (2).

sense of the draft article strictly, most violations of those global environmental treaties cannot entitle any other State party to seek remedies individually. Not surprisingly, the arrangement has been criticised as "unduly narrow."¹⁴⁰

(d) Enforcement of international crimes

General discussion on the ILC's work on international crimes of State

Finally, the ILC draft seeks to broaden further the concept of "injured State" by formulating a controversial concept of "international crimes" as serious breaches of the obligations owed to all countries in the world.¹⁴¹ In effect, all States except the violator are deemed injured if the internationally recognised wrongful act constitutes an international crime and thus become entitled to invoke the responsibility of the "author" State.¹⁴² In an effort to define the ambit of international crimes, in article 19, paragraph 2, the draft firstly characterises the general concept of the crime as "[t]he breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole. . ."¹⁴³ Then, paragraph 3 also provides several sub-categories of international crime to define the specified pattern of *serious* violations of community interests, which are commonly denounced by international society.¹⁴⁴

It may be true that, to a certain degree, the concept of international crime may largely reflect the character and range of *erga omnes* obligations with a sort of elaboration and modification.¹⁴⁵ The concept of international crimes specified in Article 19 of the ILC draft article on State responsibility nevertheless has been one of the most controversial provisions, since it was formulated in 1976.¹⁴⁶ While the draft marches toward a final conclusion, it still remains highly uncertain whether the alleged "State crimes" provision will eventually be retained. Indeed, no consensus

¹⁴⁰ Birnie and Boyle, *International Law and Environment*, at 156, n. 99. Cf. SS Wimbledon, PCIJ, Ser. A, No. 1 (1923), 20; Gray, *Judicial Remedies*, at 211; Hutchinson, "Solidarity and Breaches", at 151.

¹⁴¹ The ILC Draft articles, Art. 40 (3).

¹⁴² *Id.*

¹⁴³ The ILC Draft articles, Art. 19 (2).

¹⁴⁴ It has been observed that international crimes may occur while they are against the non-use of force, or the prohibition of genocide and apartheid. It actually matches the concept of peremptory rules of international law from which no derogation is permitted. See Spinendi, "International Crimes", at 22 [emphasis added].

¹⁴⁵ But, the two concepts are not definitely identical, even certain overlap will happen. See Spinendi, *id.* at 136-38. In the ILC community, there was general consensus that the notion of *erga omnes* obligations is wider than that of State crimes. See 1998 ILC Rep. at 293.

¹⁴⁶ Gilbert, "Criminal Responsibility", at 357.

has been reached during the recent ILC's discussion.¹⁴⁷ Actually, among the ILC members, there was increasingly intense debate regarding the propriety of including such a notion in the context of State responsibility.

Some members remain persistent in holding that State responsibility, by nature, is confined to civil responsibility, maintaining that a State is incapable of being the subject of criminal responsibility.¹⁴⁸ Further, it was observed that since the incorporation of article 19 in 1976, no international practice, such as treaties, judicial decisions or Security Council practices, has ever endorsed the view that a State may bear alleged criminal responsibility.¹⁴⁹ Also, the present device has been criticised as being insufficient because it fails to develop the procedural implications or the actual consequences of crimes,¹⁵⁰ and the language embodied in paragraph 2 and 3 in that article has been deemed defective.¹⁵¹

In contrast, some views defending the value of retaining the notion of "State crimes" were expressed. Although the device, strictly speaking, has not yet become a part of existing international law, it is believed that the work represents a progressive development and forms part of the evolutionary process of international law.¹⁵² It is stressed that the article is designed to preserve the fundamental interests of the international community by employing the concept of "State crimes", which refers to grave breaches of essential international obligations.¹⁵³ Furthermore, the recognition of *erga omnes* obligations in the *Barcelona* case and other related concepts, such as *jus cogens*¹⁵⁴ and international solidarity were cited to justify the proposition of formulating the concept of "State crimes" in addressing serious offences committed

¹⁴⁷ The 1998 ILC Rep. at 331.

¹⁴⁸ *Id.* at 250, 284.

¹⁴⁹ *Id.* at 249, 250, 273.

¹⁵⁰ *Id.* at 245, 246, 298-301. *See also id.* at 309-11.

¹⁵¹ Given the unsatisfactory arrangement in Art. 19, para. 2, the provision was suggested to be amended as follows: "An internationally wrongful act which results from the breach by a State of an obligation that is essential for the protection of fundamental interests of the international community as a whole has specific legal effects." *See* 1998 ILC Rep. at 289. Besides, the view was expressed that para. 3 should simply be deleted. Because the inherently serious nature of the crimes listed in para. 2, the additional requirement of gravity (a serious breach) in para. 3 was considered to be unjustified. *See id.* at 290, 327.

¹⁵² *Id.* at 265, 318.

¹⁵³ *Id.* at 303.

¹⁵⁴ According to Art. 53 of the Vienna Convention on the Law of Treaties, the term refers to "[a] peremptory norm of general international law [that] is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

by States.¹⁵⁵ On the other hand, some considered that the choice of the expression "State crimes" does not necessarily imply the notion of penalty as it would in the field of domestic criminal responsibility.¹⁵⁶ Thus, notwithstanding the controversial use of the term, the notion could be retained without criminalising international responsibility.¹⁵⁷

Despite the unsettled issue of "State crimes",¹⁵⁸ the ILC, after a full-scale discussion, did reach certain consensus relevant to third States' enforcement of community interests. First, the ILC members generally agreed "the existence of obligations to the international community which should be duly reflected in the draft articles."¹⁵⁹ That agreement was thus indicative of the need to further the clarification between the cognate concepts, like *erga omnes* obligations, *jus cogens* norms and alleged State crimes the function of each of which is to preserve fundamental international interests. There was general agreement that "these notions were not coextensive and should receive separate consideration to avoid any confusion."¹⁶⁰ Since the violation of these norms might justify third State countermeasures, the ILC agreed to "give further consideration to the definition of an injured State contained in article 40, particularly in relation to *erga omnes* obligations, *jus cogens* and possibly State crimes or exceptionally serious wrongful acts."¹⁶¹

Moreover, the ILC has generally taken a relatively cautious view towards the approach adopted in article 40, paragraph 3, which entitles any other State, deemed an injured State, to take countermeasures without reasonable constraints whenever an international crime occurs.¹⁶² The present device of "injured State", as observed, will render "the danger of abuse particularly great."¹⁶³ Hence it has been urged that "a differentiated schema of responses available to different States based on their 'proximity' to the breach should be introduced."¹⁶⁴

In short, there was general agreement that draft article 40 does not, as it

¹⁵⁵ *Id.*

¹⁵⁶ The ILC in its previous Report had emphasised that "alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, *inter alia*, avoiding the penal implication of the term." See 1996 ILC Report, at 141.

¹⁵⁷ *Id.* at 303.

¹⁵⁸ According to the recent ILC's conclusion, the ILC decided to put draft Art. 19 to one side for the time being. See the 1998 ILC Rep. at 331.

¹⁵⁹ *Id.* at 324.

¹⁶⁰ *Id.* at 296.

¹⁶¹ *Id.*

¹⁶² *Id.* at 324.

¹⁶³ *Id.* at 297.

presently stands, do sufficient justice to certain fundamental concepts, and that is likely to be redrafted.¹⁶⁵

Environmental crimes

The draft article 19, paragraph 3 (d) specifies that an international crime may result from "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the sea."¹⁶⁶ The concern for serious damage to global common has to some degree reflected the general view that *erga omnes* obligations towards the environment should extend to the protection of areas beyond national jurisdiction, like global common spaces. Charney particularly refers to the protection of the world's common spaces--the high seas, outer space, and Antarctica as the subjects in which the entire community has an interest. The term, "community interests," is employed to underline the significance in the protection of those areas.¹⁶⁷

Apart from the global commons defined geographically, questions will be raised whether the term "environmental crimes" may be applied to the other dimensions of environmental violations, such as destruction of natural resources. Based on an extensive view, it has been argued that the rubric of the provision should not only be limited to common spaces but also cover the preservation of natural resources. It has been maintained that "The definition is not meant to be exhaustive; it might reasonably extend to species or ecosystem destruction, or tropical deforestation with serious atmospheric consequences."¹⁶⁸

Despite the express inclusion of serious damage to the environment as constituting an international crime, it is uncertain whether the formulation may obtain universal endorsement. Some doubt if the current development of international environmental law is ready to embrace the existence of "environmental crimes of States", which may criminalise international responsibility on environmental issues. Gilbert was particularly skeptical about whether the customary norms from the decision in the *Trail Smelter Arbitration* can give rise to general criminal

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 297, 327.

¹⁶⁶ The ILC Draft articles, Art. 19 (3) (d).

¹⁶⁷ Charney, "Environmental Damage", at 161.

¹⁶⁸ Birnie and Boyle, *International Law and Environment*, at 155-56.

responsibility.¹⁶⁹ He further argued that "[the decision] was based on a specific United States-Canadian agreement and on United States inter-state laws: hardly a strong foundation for even a customary norm of an international tort of nuisance let alone a crime."¹⁷⁰ Moreover, it should be noted that, in contrast to the enforcement of gross violations of human rights obligations,¹⁷¹ international enforcement against human damage to the environment remains comparatively weak.¹⁷² In addition, the configuration of the provision seems to leave some questions unsolved. For instance, it is far from clear whether such crimes require intention or negligence.¹⁷³ Further, the wording used to describe an alleged "environmental crime", like "massive" pollution, is quite ambiguous and subject to deliberate interpretation. Hence, it is doubtful that the specification of such offences as international crimes really reflects the current customary rule of law.¹⁷⁴

(e) Summary

The ILC work on the formulation of the law of State responsibility appears to be the most relevant, supportive, and ambitious attempt to codify the third State remedy in the framework of countermeasures regime. Much evidence suggests that its device goes beyond the original rubric of *erga omnes*. Thus, not surprisingly, the draft has been considered not to codify the norms but rather to formulate new substantive rules.¹⁷⁵ In particular, the extensive application of third-State remedies, by substantially enlarging the concept of the "injured State" without any form of control, will be opposed by nations who fear that such broad discretion may be easily abused. Given certain defects contained in the draft, it is problematic whether it could remain intact until its eventual ratification. It is believed, however, that the regime of the third State remedies will certainly reach full maturity through constant international efforts. Therefore, despite certain deficiency in this draft article, its contribution to the legal development of third States' enforcement capacities is quite remarkable.

¹⁶⁹ Gilbert, "Criminal Responsibility", at 364-65.

¹⁷⁰ *Id.* at 365.

¹⁷¹ See n. 30 above.

¹⁷² The UN had ever censured Iraq's wanton destruction of Kuwaiti oil field in 1991 and reaffirmed Iraq's responsibility for environment damage. See Security Council Res. 687, para. 16. However, it is not clear whether such environmental crime was severe enough to trigger the UN's enforcement actions.

¹⁷³ Some contend that "A preferable approach would limit the category to violations of applicable international rules intended to cause serious harm to the natural environment." See Birnie and Boyle, *International Law and Environment*, at 210.

¹⁷⁴ Much skepticism was cast into the inclusion of environmental obligation in the content of international crimes. See Spinedi, "International Crimes", at 61-62.

Overall, the ILC's Draft Articles on State responsibility with respect to the situations justifying countermeasures do establish a substantive link between *erga omnes* obligations and global environmental concern mainly by illuminating the regimes designed to protect "collective interests and curb international crimes of the environment as well. However, given the un-tested definition and contentious character of its articles, the practical application of those provisions remains to be seen. On the other hand, as the ILC has decided to distinguish the special regime of *erga omnes* obligations from "State crimes", it may be interesting to see to what extent essential environmental obligations could be characterised as a part of that norm.

3 The US's Restatement on environmental enforcement

The work of the American Law Institute reflects the American lawyers' own concept of general norms of international law, instituting several provisions with respect to the third State enforcement of international law. The Restatement of Foreign Relations Law specifies "a State may bring a claim against another State for a violation of an international obligation owed to the claimant State or to *States generally* . . .".¹⁷⁶ As a result, pursuant to a comment to Section 902 of the Restatement, "When a State has violated an obligation owed to the international community as a whole, any State may bring a claim in accordance with this section *without showing that it has suffered a particular injury*."¹⁷⁷

In particular, the Restatement addresses the international remedy against the violations of human rights¹⁷⁸ and environmental obligations. Responding to the increasing concern relating to the deterioration of global environment, the Restatement provides:

A State responsible to another State for violation of Section 601 [i.e., 'injury to the environment of another State or *areas beyond the limits of national jurisdiction*'] is subject to general interstate remedies (Section 902) to prevent, reduce, or terminate the activity threatening or causing the violation, and to pay reparation for injury caused.¹⁷⁹

¹⁷⁵ The US comment, at 468.

¹⁷⁶ US Restatement (Third), at 902 (1) [emphasis added].

¹⁷⁷ *Id.* Comment *a* [emphasis added].

¹⁷⁸ The human rights violations specified by the Institute include: "genocide; murder or causing the disappearance of individuals; torture or other inhuman treatment; slavery or slave trade; systematic racial discrimination; prolonged arbitrary detention; consistent pattern of gross violations of internationally recognized human rights." See US Restatement (Third), at 702, 703.

¹⁷⁹ *Id.* at 602 (1).

As to what scope of environmental obligations may be enforceable by all States, it merely extends the obligations to the outlawing of pollution of the high seas and damage to the common environment.¹⁸⁰ Yet, it does not relate such obligations to the conservation of natural resources, like wildlife protection. As numerous treaties and documents have addressed the environmental issues beyond the traditional problems of transfrontier pollution,¹⁸¹ the Restatement's limited environmental concern is open to being construed as a narrow application.¹⁸² Caron speculates:

[A]s humanity believes increasingly that in a theoretical sense the planet belongs to all . . . , the notions of legitimate interests seems to extend far beyond traditional notions of harm. Consequently, there is a perception that *all have an interest in preventing the loss of a species, the destruction of cultural heritage, and the waste of natural resources.*¹⁸³

4 Concluding remarks

It may be safe to conclude that *erga omnes* obligations apply to environmental matters, in spite of their unsettled scope. In the light of the above discussion, however, there is a general agreement that certain breaches of environmental obligations which cause significant damage or deterioration to global common in the geographic sense may entitle all States to redress the violations without showing material injury.¹⁸⁴

As to the conservation of natural resources, the conclusion of a number of international legal documents have suggested their increasing importance for international community. Although mankind has a common interest in the preservation of natural resources, it is unclear whether all States are subject to common obligations for their protection.¹⁸⁵ Unlike incidental or intentional massive pollution to common areas causing clear and immediate damage to the global

¹⁸⁰ *Id.* at 602, 612.

¹⁸¹ Apart from the prevention of pollution on global common, a number of environmental treaties have been developed in dealing with conservation of natural resources and Cultural Heritage. Those treaties mainly include the 1972 Convention for the Protection of the World Cultural and Natural Heritage, 1973 Convention on International Trade in Endangered Species, 1992 Convention on Biological Diversity, 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes, 1994 International Tropical Timber Agreement, 1979 Berne Convention on the Conservation of European Wildlife, 1968 African Convention on the Conservation of Nature, and the 1985 ASEAN Convention on the Conservation of Nature and Natural Resources.

¹⁸² Caron, "Law of the Environment", at 528-29.

¹⁸³ *Id.* [emphasis added].

¹⁸⁴ See Charney, "Environmental Damage", at 157; Handl, "Transnational Pollution", at 58-72; Spinedi, "Convergences and Diverencies", at 248. Springer, *Pollution*, at 158-61.

environment, the exploitation of natural resources, in most cases, is a gradual process where it seems difficult to identify the points at which the severity of damage to the global environment occurs. Furthermore, arguably, within the framework of international law regarding the preservation of natural resources, the device remains generally a matter of distribution of rights to exploit or equitable utilisation,¹⁸⁶ and largely affirms the sovereign rights over natural resources.¹⁸⁷ Also, international management regimes for natural resources in the relevant treaties do not as yet function well.¹⁸⁸

In contrast, however, much literature has attempted to classify resources as a new kind of "international property", which requires a new definition of sovereignty and cooperation for the good of the international community.¹⁸⁹ In particular, some disagree that any grave damage inflicted on natural resources constituting indispensable elements to the ecosystem, like tropical forests, could not absolutely survive the test of *erga omnes* doctrine.¹⁹⁰

To sum up, it is still dubious whether certain breaches of obligations to protect natural resources may definitely be enforced by third States on behalf of the international community. The Pelly unilateral enforcement actions implemented in the protection of endangered species provides a good opportunity to examine the issue. The question may rise as to whether the *erga omnes* mandate for the global environment has already been applicable to the situation where any undesirable conduct endangering natural resources take place.

D The assessment of the legality of the Pelly sanctions in the context of environmental countermeasures

As indicated in the CITES resolutions and the US's public statement, Taiwan had been blamed for its lack of progress in halting illegal trade in tiger and rhinos

¹⁸⁵ Birnie and Boyle, *International law and Environment*, at 448.

¹⁸⁶ *Id.* at 112-19, 126, 420-21.

¹⁸⁷ See 1972 Stockholm Declaration, Principle 21; 1992 Rio Declaration, Principle 2. There are numerous multilateral treaties affirming the sovereign rights of State over the natural resources within its jurisdiction, such as art. 9 (6) of the 1933 London Convention, art. 2 (3) of the 1971 Ramsar Convention, art. 1 of the 1983 International Tropical Timber Agreement and the Preamble to the 1989 Basle Convention and the 1992 Climate Change Convention.

¹⁸⁸ Birnie and Boyle, *International law and Environment*, at 450-52.

¹⁸⁹ Handl, "Environmental Security", at 32. See also generally Schachter, *Sharing the World's Resources*.

¹⁹⁰ Such conducts are likely to constitute an international crime under the ILC's Draft article on State Responsibility. See the ILC Draft articles, Art. 19, para. 3 (d).

products. Yet it seems that the continuous consumption of those commodities may not necessarily do any direct damage to States. As far as this section is concerned, it is essential to decide whether Taiwan's conduct may entitle all States, even where they do not suffer material injury, including the US, to take countermeasures in the form of trade sanctions in vindicating the alleged offence. In terms of the ILC's Draft Articles on State Responsibility, the US must be an "injured State" in a broad sense in order to justify its remedial actions in the first place. In other words, it has to determine if Taiwan's conservation policy constituted a prior breach of international obligations, which has infringed the US's interests, irrespective of whether it is material or intangible.¹⁹¹ In doing so, most importantly, it is imperative to reveal whether any substantive law, treaty or customary law had been violated by Taiwan's allowing its people to utilise endangered species' products and its failure to adopt effective measures to crack down on the illegal trade in those species. If the violations of environmental obligations did occur, it then must decide whether the offences are enforceable by a third State.

1 Treaty law--CITES

Given Taiwan's special status in international law,¹⁹² it is relevant first to address Taiwan's position in the international environmental regime in order to illuminate the relationship between Taiwan and the international environmental regimes, particularly CITES.

In 1949, the Nationalist government of the Republic of China (ROC) retreated to Taiwan after losing a civil war with the Communists, who thereafter established the People's Republic of China (PRC) on mainland China. Until 1971, the ROC (Taiwan) held China's seat in the UN and was recognised as the sole legitimate government of China. But, the situation has been entirely modified since the UN, in October 1971, adopted resolution 2758 ordering the seat of China occupied by Taiwan to be given to the PRC.¹⁹³ As a result, the ROC (Taiwan) withdrew from the

¹⁹¹ It has been generally agreed that "In the absence of a violation, international law may not permit remedial actions." See Charney, "Third States Remedy", at 89, n. 159.

¹⁹² See generally Henckaert (ed.), *Taiwan Status*; Crawford, *Creation of States*, at 142-52.

¹⁹³ The context of the resolution generally reads as follows:

The General Assembly . . . Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council, Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United

UN. Also, nearly all the UN affiliated agencies and related organisations following the command of Resolution 396 and 2758 soon replaced the ROC (Taiwan) representative with that of the PRC.¹⁹⁴

A great number of contemporary environmental treaties were concluded under the auspices of the United Nations Environment Programme (UNEP).¹⁹⁵ Because UNEP functioned after the withdrawal of the ROC (Taiwan) from the UN, Taiwan has been continuously blocked from participating in the formation of international environmental agreements within the UN system. Faced with the increasing importance of preserving the global environment, Taiwan has been aware of the necessity and importance of joining relevant UN environmental treaties, particularly those multilateral environmental agreements (MEAs). Thus, recently, it has repeatedly expressed its willingness to accede to the relevant environmental agreements.¹⁹⁶ Regrettably, UNEP rejected Taiwan's request because of the alleged ineligibility of Taiwan for the membership of those institutions. The UN organisation has persistently maintained that Taiwan is not permitted to enter into any MEAs on the ground that "ratification to these treaties is mainly limited to sovereign states and regional organizations . . . [T]he United Nations recognizes the Government of China as the sole representative of the People's Republic of China, including Taiwan."¹⁹⁷ In short, given the view of the UN system, which has officially considered Taiwan as part of China with no separate statehood, Taiwan will find it extremely difficult to join the relevant UN environmental agreements. At present, thus, Taiwan is only granted with observer status as that of non-governmental organisations (NGOs) in some international environmental regimes.

nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.

G.A. Res. 2758, UN GAOR, 26th Sess., Supp. No. 29, at 2, UN Doc. A/8429 (1971).

¹⁹⁴ Chou, "ROC's Membership Problems", at 18-26.

¹⁹⁵ UNEP was established by the UN General Assembly based on the consensus of the 1972 UN Stockholm Conference on the Human Environment. *See* Report of the UN Conference on the Human Environment, 1972, at 29, UN Doc. A/CONF.48/14/Rev. 1, UN Sales No. E.73.II.A.14 (1972). Since its inception, UNEP has remarkably contributed to the negotiation of nearly thirty multilateral treaties by 1990. *See* Peterson, "UNEP", at 351.

¹⁹⁶ For instance, the Taiwan officials repeatedly stated that "Taiwan is willing to join the Montreal Protocol at any time if given the opportunity." *See* Republic Battles 'Environmental Mess' with Far-Reaching Programs, New Laws, 13 Int'l Env'tl Rep. (BNA) No. 1, at 5 (Jan. 10, 1990).

¹⁹⁷ Letter from A. Timoshenko, Officer-in-Charge, Environmental Law and Institutions, UNEP, to Dennis T.C. Tang, Director of the Law Section, Institute of Social Sciences and Philosophy, Academia Sinica, and Professor Daniel C. K. Chow, The Ohio State University College of Law (23 Mar. 1993). *See also* Chow, "Recognising Taiwan", at 276-77, n. 125.

Furthermore, an extensive interpretation of the UN position toward Taiwan in the context of the relationship between Taiwan and MEAs may be likely to put Taiwan into an unjustifiably disadvantaged position. Even though Taiwan is ineligible to accede to MEAs, an UNEP official claimed that Taiwan is legally bound by those treaties to which China is a party.¹⁹⁸ Admittedly, it remains to be seen whether this view will prevail. Yet, some flaws in this view appear undeniable. Chow strongly denounces the UNEP's legal opinion, arguing that "This position is incoherent and legally questionable; more importantly, it is practically untenable and poses a number of puzzling legal problems for Taiwan."¹⁹⁹

First, Chow argues that, from a purely legal point of view, the UNEP's position will run foul of the basic rule of the law of the treaty. According to the Vienna Convention on the Law of Treaties, the binding force of a treaty is based on the consent of a state.²⁰⁰ Because, from all practical aspects, China and Taiwan has been two separate political entities for almost half century, he pointed that the UN's assumption that the ratification of the treaty by China may include Taiwan over which the former has no *de facto* control may be inconsistent with the principle of consent.²⁰¹

Secondly, he uses the Montreal Protocol,²⁰² for example, claiming that the UN view will affect Taiwan's effective compliance with environmental standards. The Montreal Protocol has set different standards between developing and developed countries.²⁰³ Taiwan actually falls within the Protocol's definition for developed countries. China, in contrast, should be considered as a developing country.²⁰⁴ Treating China and Taiwan altogether, the UN's position, Chow says, "results in the application of the less rigorous developing country standard to Taiwan, a result that undermines the UNEP's own efforts to promote effective environmental standards."²⁰⁵

¹⁹⁸ Statement by L. Campbell, Deputy Coordinator, Legal Division, Ozone Secretariat, UNEP Headquarter in Nairobi, Kenya (18 May 1993). See Chow, *id.* at 277, n. 127.

¹⁹⁹ Chow, *id.* at 260-61.

²⁰⁰ Vienna Convention, Art. 35-37.

²⁰¹ Chow, "Recognizing Taiwan", at 282 and n. 155.

²⁰² Montreal Protocol on Substance That Deplete the Ozone Layer, 16 Sep. 1987, entered into force 1 Jan. 1991.

²⁰³ The Montreal Protocol defines developing countries as those with an annual per capita consumption of CFCs of less than 0.3 kilograms as of the date the countries ratified the Treaty. Developed countries are defined as those who are over the standard. See Art. 5 and 10 of the Protocol.

²⁰⁴ Taiwan's per capita consumption rate in 1986 was 0.5 kilograms. The per capita consumption in China was just 0.04 kilograms. See Shen, "Taiwan: Taiwan to Develop CFC Substitutes", *Bus. Taiwan*, 14 Sept. 1992.

²⁰⁵ Chow, "Recognizing Taiwan", at 285-86.

Thirdly, the UN's insistence that Taiwan is bound by China's accession to the Montreal Protocol will produce some obstacle for international supervision. As China is required to report statistical data regarding the control of the ozone-depletion substance, China actually is unable to obtain the relevant statistics and information from Taiwan. Furthermore, Chow observes that the UNEP's dismissal of Taiwan's submission of such data independently and on its own initiative prevents the organ from effectively assessing Taiwan's compliance with the agreement.²⁰⁶

Fourth, deeming Taiwan and China to be one entity will exclude international regimes from monitoring the activities between these two countries. Following the UN's position, the transaction between China and Taiwan is classified as an intranational transfer. As a result, Taiwan's shipping of hazardous wastes to China and the trade in endangered species between these two countries cannot be subject to international regulation.

Apart from the above theoretical and practical defects in the UN's position, the relevant practices have not been actually consistent with the UNEP's contention. For instance, some contracting parties of the Montreal Protocol, including the US, Australia, Hong Kong, Japan, and Singapore have declared that they do not consider Taiwan to be bound by China's accession to the Montreal Protocol.²⁰⁷ Other regime of MEAs, such as CITES, has never endorsed the UNEP's argument. Rather, the organisation has acknowledged that Taiwan is not currently bound by CITES, since Taiwan is not permitted to join CITES.²⁰⁸ Also, as mentioned above, the enforcement action of the CITES Standing Committee that treated Taiwan and China separately on protecting endangered species of rhinos and tiger further demonstrates that the UNEP's insistence that Taiwan is part of China simply is incorrect. As a commentator observed, "By listing China and Taiwan separately, the Committee and Secretariat, to some extent, recognize that China does not have effective control over Taiwan and that "the Authority in Taipei" has full jurisdiction over its internal matters."²⁰⁹

In the light of the above discussion, the UNEP's stand over Taiwan's relationship with MEAs is a fallacy. In conclusion, China is legally and practically unable to act

²⁰⁶ *Id.* at 287.

²⁰⁷ See "Five Nations Acknowledge Taiwan's Efforts to Cut CFC Use," *China Econ. News Serv.*, 13 Aug. 1994.

²⁰⁸ See "Taiwan Bows Out of CITES Standing Committee Meeting," *Central News Agency*, 21 Mar. 1994, at C3.

on behalf of Taiwan in the international arena, particularly in MEAs. Taiwan, thus, should not be bound by any agreements ratified by China.

Whilst the Pelly sanctions were being implemented, Taiwan was not a contracting party to CITES.²¹⁰ Pursuant to the Vienna Convention on the Law of Treaties, a treaty cannot bind a non-party without its consent.²¹¹ In this regard, there is no basis to assert that Taiwan was in breach of the obligations toward the CITES's mandate on protecting tiger and rhinos. As Charnovitz observes, "Because Taiwan has no role in setting CITES standards, it is problematic for the United States to insist that Taiwan honor them."²¹² Hence, in the context of treaty regime, given no prior breaches of international obligations by Taiwan, the US seems not entitled to take countermeasures in the form of trade embargoes.

Nevertheless, since most countries are members of CITES, it is interesting to consider a hypothetical case in which the Pelly sanctions would have targeted at any parties of CITES, like the PRC or South Korea, which both had also been censured by the CITES's Standing Committee. Although they might be presumably in breach of the CITES obligation, it remains uncertain if such an offence may be necessarily enforced by any other States.

The US may rely on some provisions of the ILC's Draft articles on State Responsibility to justify its unilateral remedy against those violators of CITES. First of all, it could invoke Article 40 (2) (e), claiming its right arising from CITES, a multilateral treaty, has been infringed by the act of China or South Korea. But, according to the requirements of the provision, the US must prove first what sort of "right" bestowed by CITES has been infringed by the conservation practice of those countries. Further, it also has to demonstrate that such infringement "necessarily affects the enjoyment of the rights or the performance of the obligations" of the US.²¹³ The fulfilment of the task seems unattainable partly because it is hard to establish the linkage between China and Korea's own breach of the CITES obligations by failing to tighten its enforcement and the infringement of US's enjoyment of the alleged rights from CITES.

²⁰⁹ Shih, "Multilateralism", at 122. *See also* Chow, "Recognizing Taiwan", at 284.

²¹⁰ *See* <http://www.cites.org/CITES/common/parties.shtml>. Taiwan is also not a signatory State to CITES. Ireland, Kuwait and Lesotho are the only three countries who are signatory States, but have not ratified the Convention.

See <http://www.cites.org/CITES/common/parties/signator.shtml>, visited on 27 August 2000.

²¹¹ *See* the Vienna Convention, Art. 34-37.

²¹² Charnovitz, "Pelly Amendment," at 801.

Secondly, Article 40 provides that a treaty regime's mandate may be enforceable by a third State if it is designed to protect the "collective interests" expressly specified in that treaty regime. CITES seems an unqualified candidate, mainly because the treaty falls short of any substantive provisions explicitly identifying the conservation of living species as collective interests, although, in its preamble, the treaty does stress the significance of promoting community interests.²¹⁴

Nevertheless, it is worth examining whether the treaty *per se* is a treaty regime designed for the protection of collective interests. If the concept of 'collective interests', as indicated above, is confined to 'common heritage', strictly speaking, CITES does not qualify, mainly because the regime has not yet acquired the same status as the deep sea-bed regime, which has been well confirmed as a typical model of protecting "common heritage of mankind". It is true that the UNEP Council in 1974 viewed certain species as "the common heritage of mankind,"²¹⁵ but, the discrepancy between CITES-like conventions and the regime controlling the deep sea-bed remains. It has been observed that "the concept of 'common heritage', though it has generated influence on the instruments of living resources, has not been incorporated into the substantive provisions of conventions, but only reflected in the preambular level."²¹⁶ Furthermore, no international management institutions for those treaties, like sea-bed authority, have been established.²¹⁷

Nevertheless, in another sense, the test of common heritage should not be considered as the only candidate for the category of 'collective interests'. The idea of collective interests may be open to further elaboration and expansion in the future in order to accommodate the increasing importance of preserving the global environment. In particular, the preservation of species to some extent has been seen as being of essential importance to human society. The threats to wildlife are now regarded "not only as threats to the existence of individual species or habitats but also to biodiversity represented by such species, which provides, *inter alia*, a gene pool of immense present and future value to humankind as well as having value for its own

²¹³ The ILC Draft articles, Art. 40 (2) (e) (ii).

²¹⁴ CITES, like other international instruments concluded for the preservation of living resources, does in its *Preamble* recognise that "wild fauna and flora . . . are an irreplaceable part of the natural systems of the earth which must be protected for *this and the generations to come*."

²¹⁵ See Nanda and Ris, "Public Trust Doctrine", at 291, 294.

²¹⁶ Birnie and Boyle, *International law and Environment*, at 448-49.

²¹⁷ *Id.* at 450-52.

sake.”²¹⁸ Thus, although the permanent sovereignty of States over their natural resources continues to prevail,²¹⁹ this has not deterred the international community from introducing concepts, such as ‘common concern’, ‘common interests’ and ‘inter-generational rights’, in an attempt to express the legitimate interests of the international community over it.²²⁰

In most occasions, such devices are incorporated in the Preambles of conservation treaties. For instance, the Preamble to the 1946 Whaling Convention²²¹ declares ‘the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks’. The 1968 African Convention²²² regards soil, water, and faunal resources as constituting ‘a capital of vital importance for mankind’. The 1985 ASEAN Agreement’s²²³ preamble recognises ‘the importance of natural resources for present and future generations’. The Preamble to CITES itself refers to wild fauna and flora as ‘an irreplaceable part of the natural systems of the earth which must be protected for this and future generations to come’. The 1992 Biodiversity Convention²²⁴ in its preamble affirms that ‘the conservation of biological diversity is a common concern of humankind’. To sum up, as observed, those conventions “do recognize in their Preambles the moral force of this concept and treat living resources as, at the least, matters of community interests.”²²⁵ It should be noted that the legal status and consequence of each formulation carrying the community interests remain unclear and need further clarification.²²⁶ But, at least, as far as the concept of common concern is concerned, while reaffirming the existing sovereign rights of States over their own resources, “[i]ts main impact appears to be that it gives the international community of states both a legitimate interest in resources of global significance and a common

²¹⁸ Birnie and Boyle, *International Law and Environment*, at 420; Sands, *Principles*, at 368-69.

²¹⁹ See Principle 2 of the Rio Declaration; Principle 21 of the Stockholm Declaration; Article 3 of the Biological Diversity Convention.

²²⁰ Birnie and Boyle, *International Law and Environment*, at 114, 448.

²²¹ International Convention for Regulating Whaling, 2 Dec. 1946, in force 10 Nov. 1948, 62 Stat. 1716, 161 U.N.T.S. 72.

²²² African Convention on the Conservation of Nature and Natural Resources, 15 Sep. 1968, in force 9 Oct. 1969, 1001 U.N.T.S. 4.

²²³ Association of South East Asian Nations Agreement on the Conservation of Nature and Nature Resources, 9 July 1985, not in force.

²²⁴ Convention on Biological Diversity, 5 June 1992, in force 29 Dec. 1993. See generally Bowman and Redgwell (ed.), *International Law and the Conservation of Biological Diversity*.

²²⁵ Birnie and Boyle, *International Law and Environment*, at 449.

²²⁶ Birnie and Boyle, *id.* at 448; Sands, *Principles*, at 218.

responsibility to assist in their sustainable development."²²⁷

Overall, it is a quite sensible contention that the preservation of living species is a matter of 'collective interests' in its common sense. Thus, it seems reasonable to claim that CITES, by nature, is an environmental treaty set for the protection of 'collective interests'. However, in terms of enforcement, it remains to be seen whether the international community at this stage is willing to broaden the scope of individual countermeasures so as to allow those living resources conventions to be enforced by third States.

2 Customary law

As mentioned above, Taiwan's non-membership of CITES makes it free from being bound by the mandate of the treaty. The policy of Taiwan relating to the preservation of tigers and rhinos, however, might possibly be claimed to violate international law on the ground that customary international rules oblige States to protect endangered species.

While, undoubtedly, it is a difficult task to identify whether a custom amounts to international law,²²⁸ there is no consensus regarding the legal status of rules governing endangered species. It appears a rather controversial issue splitting legal thought.

Glennon holds an extensive and positive view toward the prevalence of international wildlife law, particularly based on CITES's widespread acceptance. He claims that "It is now possible to conclude that customary international law requires states to take appropriate steps to protect endangered species."²²⁹ This conclusion is based on several rationales. First of all, "State practice"²³⁰ is assumed to provide the evidence because:

Like highly codified humanitarian law norms that have come to bind even states that are not parties to the instruments promulgating them, wildlife protection norms also have become binding on nonparties as customary law.²³¹

²²⁷ Birnie and Boyle, *id.* (2nd ed., to be published in 2001) at 21. See also UNEP, Report of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues (1990); Kirgis, at 525.

²²⁸ Birnie and Boyle, *International Law and Environment*, at 15; Brownlie, *International Law*, at 4-11.

²²⁹ Glennon, "Elephant", at 30.

²³⁰ The Art. 38 (1)(b) of the ICJ Statute refers "international custom, as evidence of a general practice accepted as law" as applicable law.

²³¹ Glennon, "Elephant", at 30.

Secondly, inferring from the American Law Institute's Third Restatement of US Foreign Relations Law,²³² customary norms, Glennon contends, "are created by international agreements 'when such agreements are intended for adherence by states generally and are in fact widely accepted'."²³³ CITES thus may largely fit this category due to the observation that CITES is intended for adherence by States generally and is widely accepted by most countries as parties.²³⁴ Moreover, Glennon points out that the norms are created by "the general principles of law recognized by civilized nations."²³⁵ Because CITES is seen to be broadly incorporated into domestic law, it has been suggested that "the general principles embodied in states' domestic endangered species laws may be relied upon as another source of customary law."²³⁶

Finally, Glennon observes that the documents of the UN General Assembly and international conferences delivering firm support on the matter of endangered species protection as *opinio juris* highlight the binding character of this obligation.²³⁷

In contrast to Glennon's broad approach to the legal status of the norms of protecting endangered species, Birnie and Boyle draw an opposite conclusion, mainly based on a cautious survey of the implementation of the relevant treaties, and of State practice as well. They admit that customary law can emerge from conventions and thus bind non-party States. But, by examining the finding in the *North Sea Continental Shelf* cases,²³⁸ they argue that such norms in issue must be "of a fundamentally norm-creating character, both generalizable and applied in state practice with the sense of obligation necessary to establish custom."

Birnie and Boyle maintain that mere adoption of treaties and enactment of national legislation are not conclusive evidence of this obligation.²³⁹ Rather, they say, "it is necessary to ascertain whether the norm or treaty embodying it is *applied and enforced* and whether or not the state against whom it is applied persistently objects."²⁴⁰ Echoing their view, it has been perceived that the growing membership in CITES is not a guarantee for effective enforcement. In this regard, Patel remarks:

[t]he substantial increase in CITES membership over the years indicates a significant

²³² US Restatement (Third), at 102 (3).

²³³ Glennon, "Elephant", at 30.

²³⁴ *Id.* at 31. As of 1997, there are 144 contracting parties of CITES. See Vice, "Biodiversity Treaties", at 639.

²³⁵ See Art. 38 (1)(c) of the ICJ Statute.

²³⁶ Glennon, "Elephant", at 31.

²³⁷ *Id.*

²³⁸ ICJ Rep. 1969, at 41-42.

²³⁹ Birnie and Boyle, *International law and Environment*, at 487.

international movement towards conservation. *The simple act of joining CITES*, however, is insufficient compared to demonstrating an actual intent to preserve. Without genuine attempts at enforcement, demonstrated by *enacting and administering strong legislation* at the national level, the philosophy behind CITES is nothing more than meaningless words.²⁴¹

In fact, the recent reports by NGOs and the CITES institutions suggest that the enforcement of wildlife conventions, particularly CITES, is relatively poor. For instance, according to a survey of 81 CITES parties conducted by the International Union for the Conservation of Nature (IUCN) Environmental Law Centre in 1993-94, only 12 of them had completed the full range of legislative and administrative measures needed to give effect to all aspects of the Convention and related decisions of the COP.²⁴² Similarly, assessing the work of enacting proper national law, the CITES Secretariat at the Ninth Conference of the Parties in November 1994 announced that the legislation of 27 parties out of the 81 surveyed was severely inadequate in implementing CITES, and only 15 members met CITES implementation requirements.²⁴³ There also occur continuous cases of evasion of CITES reported by NGOs, like the Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC).²⁴⁴ In addition, unsatisfactory enforcement progress plagued by ineffective communication, like the inadequate submission of national reports,²⁴⁵ a general lack of resources, and insufficient training underline the absence of universal and substantial compliance with the CITES mandate.²⁴⁶

Apart from looking at the insufficient implementation of CITES obligations, Birnie and Boyle also point out other factors which may hinder the widespread recognition of a duty to preserve species. First, as the limited function of CITES is clear, there is no comprehensive regime responsible for protection of species. They say "...one of the most widely ratified, CITES, deals only with threats represented by trade, not with habitat disturbance, over-exploitation, or the problems of migration,"

²⁴⁰ *Id.* at 487-88 [emphasis added].

²⁴¹ Patel, "Endangered Species", at 185 [emphasis added].

²⁴² See Sand, "Trade and Environment", at 47-48.

²⁴³ See CITES Secretariat, National Laws for Implementation of the Convention, Proceedings of the Ninth Meeting of the Conference of the Parties, at 2-3, UN/CITES Doc. 9.24 (Nov. 7-18, 1994).

²⁴⁴ See Birnie and Boyle, *International law and Environment*, at 488.

²⁴⁵ Pantel, "Endangered Species", at 188-89. It was estimated that 45 countries did not submit 1991 and/or 1992 reports as required. See CITES Secretariat, Review of Alleged Infractions and Other Problems of Implementation of the Convention, Proceedings of the Ninth Meeting of the Conference of the Parties, at 14-15, UN/CITES Doc. 9.22 (Nov. 7-18, 1994).

²⁴⁶ See Pantel, *id.* at 190-92.

and "that wildlife conventions in general are poorly related to or co-ordinated with those dealing with the activities and sources of pollution most threatening to wildlife."²⁴⁷ Further, unlike the deep seabed regime's status as part of the common heritage of mankind, they observe "...no internationalization of such living resources has yet occurred."²⁴⁸ Birnie and Boyle therefore conclude that the general policy of States toward the preservation of living species "does not suggest that protection of endangered species is a requirement of customary law, however desirable it is that it should be."²⁴⁹

Regardless of whether there is a requirement of customary law to preserve endangered species, Glennon's argument that the protection of endangered species "take[s] on the character of an obligation *erga omnes*"²⁵⁰ may possibly justify the US sanctions against Taiwan. Thus, he maintains that "their breach is actionable by any state."²⁵¹ In elaborating the above contention, he further articulates the concept of a "global environmental right", which entitles "all states to expect that the resource will be protected by the state in which it is found."²⁵² Therefore, it has been maintained that:

States are trustees, responsible for the preservation of species within their territories. That obligation runs to the international community as a whole: any state should be regarded as *suffering legally cognizable injury* when that obligation is breached by another state.²⁵³

Based on Glennon's relatively extensive argument, any State presumably could be accorded the right to enforce the violation of the obligation to protect endangered species against countries *inhabited* by such species. It is unclear, however, whether this contention also implies that such third State enforcement may be invoked against the consumer nation of the species, like Taiwan. Nevertheless, given his conviction that the preservation of endangered species has an *erga omnes* character, theoretically, it could become a feasible inference that the US was entitled to vindicate the alleged conservation offence committed by Taiwan.

By contrast, even if a duty of species protection has an *erga omnes* nature, there

²⁴⁷ Birnie and Boyle, *International law and Environment*, at 489.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 488.

²⁵⁰ Glennon, "Elephant", at 33.

²⁵¹ *Id.*

²⁵² *Id.* at 34.

²⁵³ *Id.* [emphasis added].

seems no consistent contention regarding the real consequence of violations of that duty. While recognising the *erga omnes* character of the concept of 'common concern', which refers to climate change, biological diversity, ozone layer and the marine environment (but not mentioning living species explicitly), Birnie and Boyle seem only to confine the right of all States to have standing to complain. They specify:

What gives these obligations a real *erga omnes* character is not that all states have standing before the ICJ in the event of breach, but that the international community can *hold individual states accountable for compliance with their obligations through institutions* such as the Conference of the Parties to the Climate Change Convention, or the Commission on Sustainable Development, or other comparable bodies endowed, whether by treaty or General Assembly resolution, with supervisory powers. The Ozone Convention and Protocol provide perhaps the best developed examples of the exercise of *erga omnes* accountability by the international community through the institutions set up by those agreements.²⁵⁴

In the light of the conflicting arguments, it seems that there still remains a considerable gap to fill between current legal development of protecting endangered species and its final achieving the status of customary law.

3 International crimes of State

It may be interesting to discuss whether it is possible to say that Taiwan's conduct constitutes an international crime as defined by the ILC's draft mentioned above. Even if an environmental crime may be extensively interpreted to cover undesirable policies undermining the protection of species, Taiwan's conduct hardly met the requirement for such allegation. It may be true that the global effort to preserve the endangered species of tigers and rhinos is hindered in one way or the other by Taiwan's failure to carry out the effective crackdown on illegal trade in those species. As observed, however, Taiwan arguably has not yet breached any substantive international obligations, which is a basic condition for committing an alleged international crime. Hence, the US's Pelly sanctions were perhaps unjustified as a countermeasure in the framework of countering an alleged international crime.

Suppose the Pelly sanctions had targeted members of CITES, like the PRC or South Korea, it would still be difficult to claim that their conduct could have been classified as a crime. It is simply because both countries who were mainly blamed for lacking satisfactory measures on the efficient control of imports of tiger and rhinos

²⁵⁴ Birnie and Boyle, *International law and Environment*, (2nd ed., to be published 2001), at 23[emphasis added].

had not directly contributed to the pending extinction of those species. As a result, they may argue that such violations of CITES do not amount to a state of "seriousness" required by the ILC's draft article.

As to producing countries who were accused of managing the species poorly, such as Russia and some African nations, they may also use the excuse of lacking sufficient financial and technological support to justify their inadequate effort. They may contend that their conduct was far from a serious breach of obligation because of the absence of intention.

In short, given the vague language and incomplete configuration embodied in the provisions of international crimes in the ILC's draft, people will find it difficult to apply the norm accurately to the violations of international environmental obligations. The assumed breach of the CITES's norm may cast doubt on the propriety of invoking the theory of international crime in an attempt to ensure adherence to the treaty's mandate.

Conclusion

According to conventional wisdom, remedies for international offences can only be taken by States that have suffered a direct injury. But, this traditional view has proved insufficient to meet the contemporary challenge posed by certain violations of community interests, which arguably merit redress by any State—even one which has suffered no tangible damage.²⁵⁵ The confirmation of *erga omnes* obligations vested in all States in the *Barcelona* case thus reflects such a trend, heralding the possible permissibility of enforcement by a third State. The examples of *erga omnes* obligations given by the World Court in the *Barcelona* judgement do not constitute a definitive list of duties owed to international community. In the future, this category may continue to evolve and expand in order to fit the needs of world concern. Yet it does not suggest that any other undesirable behaviour can always justify a third State's enforcement actions.

Although the third State remedy has possibly become attainable, the use of such a remedy should be subject to legal constraints. Otherwise the action will inevitably lead to undesirable consequence.²⁵⁶ Generally speaking, it is desirable that a unilateral remedy should be circumscribed by a collective enforcement mechanism that is competent to deal with the same offence. It is thus imperative to clarify the relationship between an individual remedy and a collective regime governing identical enforcement. Moreover, in substance, a proper device to limit the use of unilateral countermeasures may effectively prevent powerful States from deliberately wielding their might to achieve their own foreign policy under the guise of enforcing international law.

The legality of the Pelly sanctions against Taiwan under the norms of environmental countermeasures involves two propositions. First of all, there must be a prior breach of environmental obligations. Without violations, there will be no justified unilateral countermeasures. Secondly, even though such a violation does happen, the remedy action pursuant to the Pelly Amendment when no material injury has been suffered should not be regarded as legal unless the wrongful act is enforceable by all States.

Given its non-membership in CITES, Taiwan violated no treaty law with respect to endangered species protection. It is difficult to claim that Taiwan's policy

²⁵⁵ See Charney, "Environmental Damage", at 156.

²⁵⁶ See *id.* at 157-58.

committed an alleged international crime, which would be likely to warrant unilateral remedial actions. But, it appears a quite controversial issue relating to whether customary law has obliged all States to protect endangered species, irrespective of whether they are contracting parties to species conventions. Thus, it is uncertain whether Taiwan's slow progress on halting the illegal trade in tiger and rhinos products breached customary law. Further, even if such violation happened, it is unknown whether the breach is enforceable by individual actions. The uncertainty is all the greater in the absence of a consensus on whether species protection has an *erga omnes* character. As a result, under the present jurisprudence, it appears difficult to decide whether the 1994 Pelly sanctions imposed in order to further the protection of endangered species can be justified under the rules of countermeasures at the first stage.

Chapter 3

The Pelly Trade Embargoes as an Exercise of Sovereign Rights: possible limitations

Introduction

It has been generally accepted that international law allows States to conduct their economic affairs freely without substantial restrictions.¹ The use of economic measures, like trade embargoes, however, may be so coercive as to endanger the target's political independence and sovereignty. In particular, during the past few decades, a number of resolutions passed by the General Assembly of the United Nations (UN) have explicitly disapproved of the use of economic coercion that produces some impermissible effects. In the *Nicaragua* case,² complaints were also raised regarding whether economic sanctions could have violated customary international law.³

Therefore, apart from specific legal regimes discussed in latter chapters, general rules of international law might be applicable to such measures. The US's trade embargo against Taiwan authorised by the Pelly Amendment was a typical application of economic coercion. Generally speaking, from the prospect of preserving the sovereign integrity and interests of the target, such a unilateral measure might be restrained by several international principles. In particular, three possibilities will be discussed: prohibition of the use of force, non-intervention, and abuse of rights. It must be stressed that a determination of whether the US's Pelly sanctions against Taiwan breached any of these principles can only be decided after a careful examination of the facts of the particular case at hand (that of Taiwan). This chapter will undertake that analysis.

A Trade policy as a sovereign right

¹ See generally Hyde and Wehle, "Boycott", at 1-10; Lauterpacht, "Boycott", at 123, 130.

² Military and Para-military Activities in and against Nicaragua (Nicar. v. U.S.), ICJ Rep. 1986, at 14 [hereinafter *Nicaragua* case].

There was a general agreement that it is the freedom of States to conduct their economic affairs, including trade policy.⁴ Nations, therefore, in general sense, are not required to maintain trade relations with unfriendly or even hostile countries, subject to specified legal obligations. In terms of trade restrictions, such as import ban or export control,⁵ Muir particularly elaborates this sort of sovereign right, strongly supporting the legitimacy of applying trade measures. He remarks:

That the regulation of foreign trade is normally a right within the sovereign prerogatives of an independent country is too well established to permit disagreement in the context of existing international law. Individual nations have historically regulated imports by imposing tariffs, inspections, quantitative and qualitative restrictions, and numerous other conditions and barriers to international trade. They have frequently regulated exports as well, including, recently, complete cut-offs where deemed necessary to retain adequate domestic supply without inflation.⁶

In line with the contention, in the *Nicaragua* case, the International Court of Justice (ICJ) largely endorsed the right of a State. The Court found that "A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation."⁷

It seems, not until the conclusion of the General Agreement on Tariffs and Trade (GATT)⁸ in twentieth century was the appliance of trade measures institutionally regulated on the global arena. On the other hand, currently, no consensus has been reached with respect to whether general norms, particularly the duty not to intervene, have been crystallised to proscribe economic coercion that usually serves as an instrument for foreign policy.⁹ Accordingly, while the GATT proves a relatively realistic and applicable rule to evaluate such measures, some authors question earnestly the appropriateness of relying on the general uncertain rules in assessing the crucial issue.¹⁰

Moreover, as the world turns out to be closer and smaller by the influence of

³ *Id.* at 126.

⁴ See Elagab, *Non-Forcible Counter-Measures*, at 201, 203; *id.* "Coercive Economic Measures", at 691; Parry, "Economic Coercion", at 1-2; Muir, "Boycott", at 188, 192, 200, 202.

⁵ The historical practices of using the trade tool for political purposes by States *see* Muir, "Boycott", at 188-90.

⁶ *Id.* at 188, 192, 200 and 202.

⁷ *Nicaragua* case, at 138, para. 276.

⁸ The General Agreement on Tariffs and Trade, 30 Oct. 1947, in force 1 Mar. 1969, 61 Stat. (5), (6), T.I.A.S. No. 1700, 4 Bevans 639, 55-62 U.N.T.S. [hereinafter GATT].

⁹ *See* n. 99 below.

mass telecommunication, tourism, trade, cultural exchange and other forms of free intercourse across the borders, the domestic or international effort to control the transboundary influence becomes increasingly difficult. As a result, mutual influence in foreign relationships cannot be avoided. It will become a tough task for international law to distinguish the impermissible use of unilateral economic pressure from the school of mutual influence in which some patterns of acts should be tolerated, even encouraged.¹¹ Furthermore, the efforts to prohibit all kinds of external involvement in internal political affairs appear increasingly impractical and legally unnecessary.¹²

In spite of the above legal and practical impediment in applying general international rules to economic coercion, particularly trade embargoes, it remains worth examining if any general norms have put a constraint on such measures.

B Use of force

Unlike unlawful military actions that obviously contradict the purpose and principle of the UN Charter, economic coercion is not expressly prohibited by the Charter. It is, however, inadequate to jump to the conclusion that the Charter may legitimise any deliberate imposition of economic sanctions.

One possible argument by Taiwan is that the imposition of economic measures may amount to a use of force. The issue here turns on whether the action may be in violation of article 2(4) of the Charter that prohibits the use of *force* against the territorial integrity or political independence of any State.¹³

In an effort to locate a principle that counters the use of economic coercion, some arguments in support of a broad interpretation of article 2(4) of the Charter were put forward.¹⁴ It has been maintained that "force", apart from referring to the traditional concept of military action, should be read to encompass any form of coercion, such as political or economic coercion that seriously endangers fundamental national interests.¹⁵ The oil embargo launched by the Arab allies against countries of

¹⁰ See Muir, "Boycott", at 204. See also Elagab, *Non-Forcible Counter-Measures*, at 212-13.

¹¹ See Damrosch, "Nonintervention", at 5. Damrosch addressed a lot of nonforcible means States use to affect the national policy of another State, such as lobbying, propaganda, direct satellite broadcasting and economic aides and cooperation etc.. See *id.* at 6, 28-31.

¹² *Id.* at 5.

¹³ Shihata, "Destination Embargo", at 591; Paust and Blaustein, "Oil Weapon", at 410; Boorman III, "Economic Coercion", at 205; Farer, "Economic Coercion", at 405 [emphasis added].

¹⁴ Brosche, "Oil Embargo", at 18-30; Paust and Blaustein, *id.* at 410.

¹⁵ *Id.*

pro-Israel in 1973-1974, primarily the US, has been invoked as a respectable model.¹⁶ As petroleum has become one of the most important resources of energy in the world, not surprisingly, the natural resource can be manipulated by oil-exporting nations as a powerful tool to serve foreign policy. In particular, one of the commentators further argues that the 1973 Arab embargo "substantially impaired the goals of international community as articulated in the Charter, not counterbalanced by complementary policies relating to legitimate self-defence or the sanctioning of UN decisions, constitutes a violation of Article 2(4)."¹⁷

Certainly, the term "force", in a wide sense, as Schachter observes, may "embrace all types of coercion: economic, political and psychological as well as physical."¹⁸ Much evidence and many legal arguments, nevertheless, take a restrictive approach, holding that article 2 (4) of the Charter does not encompass economic coercion. It has been observed that law-making history regarding article 2(4) continued to frustrate the attempt to expand the concept of "force" to include economic pressure. During the UN San Francisco Conference in 1945, the Latin American States put forward a proposal that aimed to extend the scope of such provision to the condemnation of economic and political force. The proposal was eventually rejected.¹⁹

Latterly, in the resolutions of the UN General Assembly, considerable efforts, mainly made by the developing countries, to comprise economic coercion within the scope of prohibition on the use of force were also defeated. For instance, in the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970 Declaration on Friendly Relations),²⁰ article 2(4) was interpreted and elaborated substantially. But, none of its context relates the principle to the use of economic means.²¹ In addition, during the labourious process undertaken by the General Assembly to spawn a definition of aggression,²² the concept of *economic aggression*

¹⁶ *Id.*

¹⁷ Paust and Blausten, *id.* at 415. Cf. Farer, "Economic Coercion," at 409-12.

¹⁸ Schachter, *International law*, at 110.

¹⁹ The proposal was rejected by vote 26 to 2. See Doc. 784, I/1/27,6 U.N.C.I.O. Docs. 331, 334-35 (1945).

²⁰ G.A. Res. 2625 (XXV) (1970).

²¹ See Neff, *Economic Liberalism*, at 133.

²² On Oct. 3, 1952, the Secretary-General, acting in compliance with G. A. Res. 599, submitted a comprehensive report on the question of defining aggression. UN Doc. A/2211. See generally Stone, *Aggression and World Order*, at 50-77. In 1967, the General Assembly decided to expedite the efforts

eventually was not included in the 1974 Resolution on the Definition of Aggression.²³

Moreover, the whole structure of the Charter tends to reject a broad reading of article 2(4). The exercise of the right of self-defence by States specified in article 51 of the Charter is inherently designed to respond to an *armed attack* rather than economic pressure. The inclusion of economic pressure as a type of "force" theoretically would lead to textual inconsistency between article 2(4) and article 51.²⁴ Also, it seems that the fundamental mandate of the Charter is to preserve peace and security by checking the unlawful use of armed force. It has not yet gone so far to directly deal with economic coercion. Farer's analysis clearly underline such rationale:

What I find preeminent in the *travaux préparatoires* for the United Nations Charter is a desire quite simply to outlaw war as an instrument of state policy or self-help. The Parties to the Charter were clearly concerned about the use of military force. . . . Moreover, the whole emphasis of the purposes and principles of the Charter is on peace, the prevention of armed conflict. Furthermore, it is suggestive that the United Nations has never been thought to have chapter VII jurisdiction in cases not involving a military threat by one state against another. . . . it may be concluded that Article 2(4) was concerned with violence, with military force, not with economic coercion.²⁵

Therefore, it may be concluded that the original implication of the principle against use of force does not extend to economic pressure. Also, strictly speaking, the rule has not yet been elaborated as to expressly forbid the use of economic power.

In addition, aside from the UN law regime, attempts to equate economic coercion with the use of force in other contexts have proved unsuccessful. For instance, in the negotiation of the Vienna Convention on the Law of Treaties,²⁶ the invalidity of treaties resulting from coercion of a State was generally accepted, but there was disagreement as to the scope of alleged "coercion." Communists and certain

to define aggression, and established a Special Committee on the Question of Defining Aggression. See G.A. Res. 2330. The Committee finally adopted a definition by consensus in 1974 and recommended it for adoption by the General Assembly.

²³ G.A. Res. 3314 (XXIX). The scope of an act of aggression *sees* Art. 1 and 3 of the Resolution. In 1952, Bolivia proposed that "unilateral action to deprive a State of the economic resources derived from the fair practice of international trade, or to endanger its economy, thus jeopardizing the security of that State or rendering it incapable of acting in its own defence and cooperating in the collective defence of peace" should have been considered an act of aggression. See UN Doc. A/2211 at 58 [emphasis added].

²⁴ Joyner, "Transnational Boycott", at 241.

²⁵ Farer, "Economic Coercion", at 410.

²⁶ UN Doc. A/CONF. 39/27; signed at Vienna 23 May, 1969; entered into force 27 Jan. 1980.

Third World countries argued that economic and political pressures, just as much as the use of force, constituted a form of coercion.²⁷ As a result, the Vienna Conference echoed such demand by adopting a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, which condemned the use of economic pressure to procure the formation of a treaty.²⁸ This approach, however, was not included in the final context of the 1969 Vienna Convention. Article 52 of the Convention simply provides: "A treaty is void if its conclusion has been procured by the *threat or use of force* in violation of the principles of international law embodied in the Charter of the United Nations."

A similar debate was triggered again when the International Law Commission (ILC) drafted the law of treaties between States and international organisations.²⁹ The Commission decided not to change the formulation enunciated in the 1969 Vienna Convention, but this time to incorporate the text directly as an article of the new draft treaty.³⁰ Ultimately, the provision became an integral part of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.³¹

In spite of the distinction between economic coercion and use of force that remains, international community must not ignore the extreme cases in which severe economic coercion may cause irrecoverable damage to target nation. Neff, accordingly, argues that, in exceptional circumstances, economic pressure of particular severity should be covered by the principle against the use of force.³² Under the prevailing understanding of the UN Charter, indeed, there is no explicit prohibition of economic coercion. Nevertheless, since, as observed, "the Charter is no historical monument, but a living instrument which continues to expand due to the dynamic and progressive nature of our international society . . .",³³ it is highly desirable to collaborate in universal efforts to amend the Charter or in the negotiation of relevant multilateral treaties to deal with the caustic economic coercion. Therefore, a feasible solution is to revise the Charter instead of introducing an

²⁷ See Shaw, *International Law*, at 664.

²⁸ UN Doc. A/CONF. 39/26, annex.

²⁹ See 1982 Y.B. of ILC, Vol. II, Part 2, at 55.

³⁰ *Id.*

³¹ UN Doc. A/CONF. 129/15; signed at Vienna 20 Mar. 1986.

³² See Neff, *Economic Liberalism*, at 133-34. See also Brosche, "Oil Embargo", at 34; Muir, "Boycott", at 202-4; and Farer, "Economic Coercion", at 411-13.

³³ Brosche, *id.* at 23.

extensive interpretation of article 2(4).

In the light of the above analysis, general speaking, the Pelly sanctions against Taiwan in the form of economic measures, based on the dominant wisdom, would not violate the principle against the use of force enunciated in the UN Charter.

C Non-Intervention

1 The legal implication of the non-intervention principle on economic coercion

(a) General Discussion

A second possibility is that the use of economic coercion may violate the general principle of non-intervention. The doctrine of non-intervention has evolved for centuries from historical and political aspirations³⁴ to becoming a legal principle of international law.³⁵ The doctrine primarily aims to protect the sovereign integrity and political independence of a State from external interference, despite the fact that the notion of complete independence always seems a remote and impractical objective³⁶ and the concept of inviolability of sovereignty has been the subject of much challenge.³⁷ From the point of view of likely target States, the rule, according to the World Court's decision, is considered to safeguard the *right* of a State to conduct its affairs and choose its own systems freely without outside interference.³⁸

Under contemporary international law, much evidence indicates that the doctrine against intervention has merged with other legal formulations, instead of merely serving as an individual rule.³⁹ This evolution can best be reflected on several main principles in the UN Charter, which contain the implication of non-intervention designed to preserve sovereign freedom.⁴⁰ For instance, articles 1(2) and 55 of the Charter advocate the principle of equal rights and self-determination of peoples.⁴¹

³⁴ See Conforti, "Non-Intervention", at 467-68.

³⁵ The World Court decided that "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference, . . . the Court considers that it is part and parcel of customary international law." See *Nicaragua* case, at 106. para. 202.

³⁶ As a writer observes, "Independence cannot imply that every state, no matter how small, is immune from the political and economic influence of other States, for such influence is a fact of international life." See O'Connell, *International Law*, at 298.

³⁷ Seeing that most States are increasingly incorporated into a world system, which would limit States' autonomy, the author observes that "[t]he sovereignty of a State means the *residuum* of power, which it possesses within the confines laid down by international law." See Stark, *International Law*, at 100.

³⁸ See *Nicaragua* case, at 106, para. 202 [emphasis added].

³⁹ See Conforti, "Non-Intervention", at 468-71.

⁴⁰ See Damrosch, "Nonintervention", at 8.

⁴¹ The principle of equal rights and self-determination of peoples elaborated in the 1970 UN Declaration on Principles of International Law provides "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural

Moreover, Article 2(1) of the Charter provides that the principle of the sovereign equality of all its members is the foundation of the Organisation.⁴² The World Court, ruling on the linkage between these two principles, decides that the non-intervention is "a corollary of the principle of the sovereign equality of States."⁴³

As it has generally become a well-recognised rule that States are prohibited from using force to interfere in the national affairs of other nations,⁴⁴ the legality of non-forcible coercion under the doctrine of non-intervention remains quite a controversial topic.⁴⁵ It may be contended, on one hand, that such actions by nature generate more or less impact on the political operation of the target country, and, generally, are launched in an attempt to seek change in national behaviour. As the economy has played an increasingly vital role in political stability, it is unpersuasive to contend that any exercise of non-forcible measures, particularly economic pressure, will definitely not lead to an encroachment of the political independence of a sovereign State. Thus, such external influence is likely to contradict the rule against intervention. On the other hand, it still has been strongly argued that nations are not legally required to continue trade relations with unfriendly States.⁴⁶ This argument will certainly thwart the applicability of the norm to the use of economic measures.

To explore the contemporary significance of the principle of non-intervention in disputes arising from the use of economic measures, emphasis should be placed first on whether the rule has been well developed to be a feasible law to limit such action. The effort will largely rest on the analysis of relevant UN Resolutions on non-intervention because those documents offer substantial evidence that links the principle to economic coercion. Of course, it is also important to examine the decision of the ICJ on the 1986 *Nicaragua* case, which particularly addressed the consistency of economic measures with principle of non-intervention, in spite of

development, and every state has the duty to respect this right in accordance with the provisions of the Charter."

⁴² The principle of sovereign equality of States in the 1970 UN Declaration provides the relevant elements:

"(c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the state are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems."

⁴³ *Nicaragua case*, at 106, para. 202. See also Cassese, *International Law*, at 143-44.

⁴⁴ Cassese, *id.* at 145.

⁴⁵ See Bowett, "Economic Coercion", at 1, 3-5; Bowett, "International Law", at 246; Conforti, "Non-Intervention", at 471-72; Elagab, *Non-forcible Counter-Measures*, at 208; Farer, "Economic Coercion", at 406, 411; Damrosch, "NonIntervention", at 1-2, 5-13, 28-34, 45-47; Lillich, "Economic Coercion", at 236-38 and *Nicaragua case*, at 126, para. 245.

⁴⁶ See *Nicaragua case*, at 138, para. 275.

insufficient elaboration on the topic. While economic measures are alternatively and frequently used as an instrument to change behaviour of another State, it also merits discussion to what extent should the norm prohibit States from resorting to economic pressure for a political purpose? It seems clear that not all the trade measures are so influential as to affect the freedom of sovereign States to conduct their affairs. Thus, it is essential to discuss what criteria should be introduced or elaborated in order to decide which economic coercion constitutes intervention.

(b) The UN Resolutions

Since 1950s, the UN General Assembly has endeavoured to respond to undesirable external interference by means of declaring a number of significant documents carrying certain normative implication against any forms of intervention regardless of whether being forcible or non-forcible.⁴⁷ The 1965 "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty"⁴⁸ explicitly denounced "the use of *economic*, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind." In 1970, the General Assembly adopted, by consensus,⁴⁹ the Declaration on Friendly Relations. Reaffirming the mandate against any form of intervention solemnly advocated in the 1965 Declaration on Intervention, the document, in the principle of "*the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter*," addressing economic coercion, reads as:

No State or group States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and *all other forms of interference* or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.

No State may use or encourage the use of *economic*, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

⁴⁷ The demands for the prohibition of other forms of intervention was initiated by mainly Latin-American and socialist countries, then joined by most African and Asian nations. See Cassese, *International Law*, at 145.

⁴⁸ G.A. Res. 2131(XX) (1965).

In addition, other subsequent resolutions adopted by the Assembly persistently take a strong stand against economic as well as other forms of coercion. For instance, the 1973 Resolution on Permanent Sovereignty over Natural Resources deplored "acts of State which involve force, armed aggression, *economic coercion* and other illegal or improper means of resolving disputes" and emphasised the duty of all states to refrain in their international relations from military, political, *economic* and any other form of coercion.⁵⁰ Article 32 of the 1974 Charter of Economic Rights and Duties of States provides: "No State may use or encourage the use of *economic*, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights."⁵¹ Moreover, the 1981 UN Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981 Declaration), which aims to elaborate the previous document concerning the duty of non-intervention, stresses:

The duty of a State, in the conduct of its international relations in the *economic*, social, technical and *trade* field, to refrain from measures which would constitute interference or intervention in the internal or external affairs of another State, thus preventing it from determining freely its political, economic and social development; this includes, inter alia, the duty of a State not to use its *external economic assistance programme or adopt any multilateral or unilateral economic reprisal or blockade and to prevent the use of transnational and multinational corporations under its jurisdiction and control as instruments of political pressure or coercion against another State*, in violation of the Charter of the United Nations.⁵²

Notwithstanding the clear prohibition on economic coercion announced by the Resolutions, much doubt was raised to challenge the legal implication of such documents. In order to reach a consensus, it is true, the high degree of political conflict⁵³ during the negotiation process made the resolutions, particularly the 1965 and 1970 Declarations, a product of compromise, carrying imprecise text. Therefore, a lot of criticism was expressed on the vague provisions of those documents. Most of them refer to the context regarding unlawful non-violent coercive measures, which requires the establishment of an intention of dominating the sovereign will of another

⁴⁹ No vote had been held on the adoption of the resolution.

⁵⁰ G.A. Res. 3171(XXVIII).

⁵¹ G.A. Res. 3281 (XXIX).

⁵² G. A. Res. 36/ 103, Part II, para. (k), (9 Dec. 1981).

⁵³ See Damrosch, "Nonintervention", at 11; Elagab, *Non-forcible Counter-Measures*, at 208.

country and obtaining advantage from the exercise of the measures.⁵⁴ Undoubtedly, the requirement is likely to allow certain economic sanctions to be legal, because some of them may not meet the exact definition of an illicit coercion under the Resolutions. It is also true that, in exchange for unanimity on wording of the Resolutions, the provisions relating to economic coercion were purposely couched in broad terms rather than precise ones.⁵⁵ Consequently, some countries regarded the arrangement as an effect of attempting to minimise the legal significance of it.⁵⁶ However, it should be recalled that the ambiguity regarding the definition of intervention in above documents has been largely alleviated by subsequent UN Resolutions. For instance, unlike the adoption of the predominating requirement in the previous documents, the 1981 Declaration lays more stresses on the impact of measures. It generates a relatively precise definition of economic intervention, which simply underlines that States refrain from economic measures which would constitute intervention to the effect that the intervened States' freedom to decide its political, economic and social development would be infringed.

It is strongly argued that the rules formulated by the resolutions have a close linkage with the UN Charter and constitute an authoritative interpretation of the principles embodied in the Charter.⁵⁷ In contrast, observing that the text of the Charter does not explicitly preclude economic coercion, Elagab dismissed the idea that the principle of non-intervention articulated in the resolutions regarding economic coercion was a product of interpretation of the Charter.⁵⁸ Therefore, it might be interesting to explore which school of knowledge can best meet the real need of the modern world.

It seems reasonable that, to preserve the political independence of sovereign States, any form of coercive actions against the sovereign integrity should be a main concern of the UN Charter. While the imposition of economic measures by powerful

⁵⁴ See Acevedo, "US Measures", at 334; Bowett, "International Law", at 248; Elagab, *Non-forcible Counter-Measures*, at 206-07, 208-09.

⁵⁵ See Elagab, *id.* at 208.

⁵⁶ See O'Connell, *International Law*, at 314.

⁵⁷ Lillich, "Economic Coercion", at 237; Schachter, *International Law*, at 361, n. 189; Rosenstock, "Friendly Relations", at 713. Many delegates expressed the similar view. For example, Yaseen stated: "the content of the draft Declaration derived its value from its very source. Since its formulations constituted an attempt to clarify and interpret the fundamental principles of the Charter, they should be regarded as having binding force, to the same extent as the latter, and as forming part of positive international law." In the words of Maiga of Mali, "the declaration was an interpretation of the Charter, and consequently no State which adopted it could evade its responsibilities." See Summary Records of Meeting of Sixth Committee (A/C.6/SR), UNGAOR, 25th Sess.

States to serve distinct political purpose becomes more frequent and intensive, armed intervention excepted, other non-violent measures are also likely to be sufficiently detrimental as to violate the political independence of sovereign States, a right preserved by the Charter. It will be timely and appropriate to extend the rule of non-intervention to limit certain acts of economic coercion that may produce impermissible consequences. Thus, in the present writer's view, the proposition that the work of the UN documents on principle of non-intervention is a creative and extensive interpretation of the Charter merits support.

In addition, those documents were accused of lacking any accompanying State practice. In Elagab's argument, this insufficient practice suggests that "it is not indicative of emergent rules."⁵⁹ Such inference, to a great extent, relies on the practice of the United States, a primary economic sanctions user after World War II.⁶⁰ While employment of economic coercion is persistently believed by powerful States to be an effective means of attaining foreign policy goals, not surprisingly, those nations will try desperately to defend the legality of applying economic sanctions and resist any legal effect produced by the Resolutions. It is doubtful that such particular national practice can win universal support. In actual fact, as specified in the preamble of the Declaration on Intervention, the UN Resolutions were virtually created to confirm much of the existing practices in the world. It states:

The General Assembly, reaffirming the principle of non-intervention, proclaimed in the charters of the Organisation of American States, the League of Arab States and of the Organisation of African Unity and affirmed at the Conferences of Montevideo, Buenos Aires, Chapultepec and Bogota, as well as in the decisions of the Afro-Asian Conference at Bandung, the First Conference of Heads of State or government of Non-Alligned Countries at Belgrade, in the Programme for Peace and International Co-operation adopted at the end of the Second Conference of Heads of state or Government of Non- aligned Countries at Cairo, and in the declaration on subversion adopted in Accra by the Heads of State and Government of the African states."

Hence, all these documents, to certain degree, have reflected the general aspiration of the majority of the countries against diverse form of intervention.

⁵⁸ See Elagab, *Non-forcible Counter-Measures*, at 206.

⁵⁹ See *id.* at 206-7.

⁶⁰ According to Hufbauer and Scott's survey, of the 116 cases of economic sanctions documented from World War I to 1990, the United States, either alone or in concert with its allies, has deployed sanctions 77 times. See Hufbauer and Scott, *Economic Sanctions*, at 8-9.

In the light of the above analysis, it is contended that the documents articulated by the General Assembly have created a specific legal effect regarding the current implications of the norm of non-intervention, even though they do not have formal binding force as do those international treaties. It is worth upholding that, as Salmon maintains, "If states agree by consensus to the approval by the General Assembly of a text whereby the Assembly 'solemnly proclaims the following principles', this means that those States in the exercise of their full sovereignty certify the existence of such principles, irrespective of their formal source (interpretation of the Charter, custom, resolutions accepted, etc.)."⁶¹ Therefore, if the documents are interpreted and applied properly, it is not unreasonable to qualify the declarations as a plausible evidence of law⁶² regarding the limitation of economic coercion, despite the fact that the scope of its application still needs elaboration. The ICJ case, discussed below, to some degree, reflected such trend.

(c) Judicial precedent: The *Nicaragua* case

In the 1986 *Nicaragua* case, the Court has made a lot of efforts to clarify the interpretation and application of the non-intervention doctrine in the contemporary international community. To confirm the existence of customary law of non-intervention, the Court regarded the relevant declarations of the UN as evidence of *opinio juris*, which reflects the principle of non-intervention.⁶³ Also, the Court, stressing the significance of the Resolutions, mentioned "... resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law."⁶⁴ As Boyle observes, the ICJ case law indicates that "soft law instruments (the resolutions of the General Assembly) may operate in conjunction with a treaty (the UN Charter) to provide evidence of *opinio juris* for the possible emergence of a rule of customary international law."⁶⁵

Moreover, as to the scope of intervention, it considered that prohibited intervention should no longer be confined to armed intervention. The Court pronounced: "Intervention is wrongful when it uses *methods of coercion* in regard to such choices, which must remain free ones. The element of coercion, which defines,

⁶¹ Salmon, "Friendly Relations", at 421.

⁶² E.g. Janis, *International Law*, at 50.

⁶³ *Nicaragua* case, at 106, 107, paras. 202, 203.

⁶⁴ *Id.* at 107, para. 203.

⁶⁵ Boyle, "Reflections on Treaties and Soft Law", at 906.

and indeed forms the very essence of prohibited intervention . . ."⁶⁶ Such timely and adequate interpretation of the doctrine of non-intervention has largely mirrored the formulation contained in the relevant UN resolutions. In other words, the Court considered that intervention is wrongful as long as it is carried out by coercive methods regardless of being forcible or non-forcible.⁶⁷ The assumption implies that even non-forcible (i.e., non-military) acts, if proved coercive, like funding the rebels within another State,⁶⁸ are likely to constitute an unlawful intervention. Overall, in the 1986 *Nicaragua* case, the Court largely adopted the implication of non-intervention contained in the UN Declarations, particularly, Resolution 2625, to deal with the legality of the US's coercive actions against Nicaragua.⁶⁹

In addition to the judgement on forcible intervention, the Court dealt with the legality of unilateral economic coercion under the principle of non-intervention. Actually, the ICJ was accorded the unprecedented chance to adjudicate on the issue. Yet it did not spawn a satisfactory result and missed the opportunity to clarify the relations between economic coercion and non-intervention principle. With respect to the US economic sanctions against Nicaragua, the Court held that the US's measures did not fall into this category. It merely concluded that "it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention."⁷⁰

This decision regarding the US's economic measures proved unsatisfactory, not because the Court did not cite the relevant UN Resolutions on the limitation of economic coercion as a source of applicable law, but because, chiefly, it failed to deliver any rationale to sustain such a conclusion. It should be recalled that the ICJ did admit that the prohibited intervention is not limited to the form of use of force. It also ruled that certain non-forcible measures, like funding of rebels, may amount to unlawful intervention.⁷¹ If the US economic measures proved so coercive as to interfere in Nicaraguan domestic affairs, under the Court's own definition of an

⁶⁶ *Id.* at 108, para. 205 [emphasis added].

⁶⁷ *Nicaragua* case, at 108, para. 205.

⁶⁸ *Id.* at 124, para. 242.

⁶⁹ Most coercive measures of the US against Nicaragua were found as a breach of customary law of non-intervention in 1986 ICJ decision. It is convinced that the adjudication actually reflects the mandate of the UN Resolutions 2625 concerning the principle of non-intervention, which provides: "No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

⁷⁰ *Nicaragua* case, at 126, para. 245.

alleged intervention, those actions should have constituted intervention.⁷² As Teson observes, "the presumption should be that the most powerful nation in the world has coercive economic power over a country like Nicaragua. In short, if the economic sanctions were coercive and that coercion was exerted on which Nicaragua was legally free to act, those sanctions, under the Court's definition, ought to violate the principle of non-intervention."⁷³ Therefore, it is difficult to contemplate how the Court arrived at the conclusion that the US's embargo against Nicaragua was not a violation of the principle of non-intervention.

Some writers, however, have attempted to explain why the Court refused to extend the rules against intervention to the use of economic coercion in the present dispute. Damrosch observes that "possibly it was mindful that a contrary holding would in effect have obligated donor states or trading partners to continue pre-existing aid or trade relations even with a state whose government had taken an unfriendly turn."⁷⁴ Also, Teson assumes that: "The Court's holding can be perhaps explained by the fact that economic sanctions are not directly related to the support for rebels. They are not strictly linked to the United States' participation in Nicaragua civil war. Therefore, it seems, they do not exhibit the degree of coercion entailed by such participation."⁷⁵ The assumption hidden in the decision, however, cannot justify the Court's failure to provide sufficient grounds to sustain its judgement.

By the criteria proposed in the subsequent section, the Court should first have detected the intention of the US Reagan Administration in imposing the comprehensive trade embargo against the government of Nicaragua. It appears pertinent to distinguish between measures applied simply to discontinue trade relations with an unfriendly regime the US dislikes⁷⁶ and those carrying a clear motivation of interfering in another nation's policy that legally subjects to the discretion of target State.

Secondly, to determine whether the economic measures launched by the US were so coercive as to be objectively capable of subordinating the exercise of Nicaragua's sovereign right, the Court should have weighed different factors that might influence the impact of economic coercion upon the target. Indeed, the court

⁷¹ *Nicaragua case*, at 124, para. 242.

⁷² See Teson, *Humanitarian Intervention*, at 299.

⁷³ *Id.*

⁷⁴ See Damrosch, "Nonintervention", at 34.

⁷⁵ Teson, *Humanitarian Intervention*, at 299.

had classified the intention of the US in providing substantial support for the rebels as one aiming to achieve a change of government in Nicaragua by coercive methods.⁷⁷ But, regrettably, the Court did not elaborate the relevant criteria to further a more thorough evaluation of the legality of such economic measures.⁷⁸

To sum up, the ICJ has not yet formulated a substantial rationale concerning the determination of the legality of taking economic sanctions unilaterally. Although the Court's judgement has been repeatedly cited by writers to justify the use of trade sanctions,⁷⁹ it is wrong to conclude that the decision has established solid ground on which any trade embargo, under principle of non-intervention, is legitimated. It remains possible that the UN Resolutions in respect of the limitations on economic coercion are still likely to be applied and elaborated by international tribunals, if similar disputes arise.

(d) The criteria for unlawful intervention

If the mandate that non-intervention principle has evolved to forbid certain impermissible economic coercion can be accepted, the crucial work for the international community then is to formulate proper criteria in determining which economic sanctions would be evaluated as unlawful. The subjective and objective test perhaps provide a basic framework for the study.

(i) Subjective test

One approach holds that the predominant purpose of a coercive action is the criterion for determining unlawful intervention. It seems not difficult to find the theoretical basis for such an approach. Inspired by the rule of English common law,⁸⁰ Bowett vigorously upholds the subjective criterion by arguing that unlawful coercion should be characterised by the *intent* or *purpose* of the State that applies the measure rather than by the *effect* caused by the action.⁸¹ The criterion of "effect" of the economic conduct, in his view, imposing on a complaining state the burden of proof

⁷⁶ See Damrosch, "Nonintervention", at 47.

⁷⁷ *Nicaragua* case, at 124, para. 241.

⁷⁸ The purpose of the US's economic sanctions against Nicaragua was believed to seek the change of Nicaragua's national policy as well as serve a complemented role to the package deal that aims to destabilise the Nicaragua regime. See Henderson, "Economic Sanctions", at 192-94; Carter, *Economic Sanctions*, at 13.

⁷⁹ E.g. Carter, *id.* at 5, n. 6; Warbrick, "Sovereign Equality", at 208.

⁸⁰ As one author stated, "For example, the tort of conspiracy evolved to cover the situation in which two or more persons conspire to commit acts which are lawful *per se* but are motivated predominantly by the desire to injure the economic interests of the plaintiff rather than to protect the interests of the defendants." See Bowett, "Economic Coercion", at 5.

⁸¹ *Id.*

seems less valuable.⁸² Bowett further contends that the *predominant purpose test* "would probably provide a more effective criterion for defining illegal economic coercion than the notion of "*subordination of sovereign rights*" or "*securing advantages*" used in the General Assembly Declaration."⁸³ By Bowett's argument, it seems to suggest that the intent to intervene in national affairs alone is sufficient to define an illegal economic coercion.

However, much doubt is cast to the difficulty of identifying the real intention of a State, whenever economic coercion is being launched. Acevedo argues: "The real difficulty, however, is how to make an objective determination of a notion as subjective as the 'actual' or 'real' intention or purpose of a state."⁸⁴ Parry quoting Judge Hudson further claims: "if, as the old judge said, the thought of man is not triable, for the Devil himself knoweth not the thought of man, how much more difficult is it to ascertain with certainty the thought or motive and intent of a state."⁸⁵ Moreover, in practice, if an action of economic conduct is invoked with multi-purposes or mixed intention, it may create additional obstacles in evaluating the intention of a State. In contrast, irrespective of the obstacle in finding the real intention of an acting State, Acevedo, citing the decision of the ICJ in the *Nuclear Test* case,⁸⁶ assumes: "it is often possible to establish the real motives or purposes of a state's economic or political conduct on the basis of its own statements."⁸⁷ As a result, it is not impossible that public statements or official documents of government may assist the finding of a real intention of an action.

Overall, it seems that the use of economic coercion, even carrying the clear intention to intervene in national affairs, is not always able to lead to the actual infringement on the freedom of conducting internal or external affairs of a sovereign State. In determining whether a certain economic measure violates the principle of non-intervention, apart from the subjective test, introduction of a relatively tangible criterion appears essential for a thorough and fair judgement of the action.

(ii) *Objective test*

Other writers favour looking to the *effect* on the victim State as a more reliable

⁸² See Bowett, "International Law", at 248.

⁸³ See Bowett, "Economic Coercion", at 5.

⁸⁴ Acevedo, "US Measures", at 335.

⁸⁵ Parry, "Economic Coercion", at 4.

⁸⁶ *The Nuclear Test cases*, (Australia v. France) (New Zealand v. France), ICJ Rep. 1974, at 253, 269.

⁸⁷ Acevedo, "US Measures", at 335.

criterion than the predominant purpose test.⁸⁸ The approach is concerned with whether the use of a particular economic measure is objectively able to cause the effect to the extent that the sovereign rights to choose its system would be substantially interfered with.

The objective test, as noted, has been reflected in the 1981 UN Declaration. Also, the criterion is largely consistent with the requirement adopted by the ICJ for the alleged "intervention". As indicated, the World Court's ruling in the *Nicaragua* case suggests that only coercive measures, notwithstanding whether being forcible or non-forcible, may constitute intervention. Thus, non-coercive conduct is permissible.

With respect to what economic measures amount to the effect of coercion, some proposals possibly facilitate the understanding. As Conforti maintains:

[w]hen it is possible to say that there has effectively been illicit interference in the political, economic, social and cultural choices of a State? We believe that this occurs when the measures used by the State which is intervening are *objectively capable of modifying these choices* in the particular circumstances.⁸⁹

A supportive example would be the practice, asserted by Damrosch, that "sanctions so *crippling* as to undermine the economic foundations for the exercise of political freedom."⁹⁰ In addition, the concept of the *intensity* of the action was referred by Muir as an "essential element in such a judgement."⁹¹ Such a claim simply suggests that the *means and content* of the embargo imposed by the sender is critical to the assessment. For instance, it is evident that the comprehensive interruption of a commercial relationship appears quite coercive, and usually may generate considerably destructive economic loss on the target. In contrast, damage by a mere ban on a proportion of imports from the victim State is relatively minor. Besides, trade restrictions, such as export control, on different products have unequal significance on the target country. It is clear that a country under sanctions will suffer more from the termination of food stuff or energy supply than the other products.

Yet, it also true that even the same methods imposed on the different target may have a different impact. One straw can break a camel, if the latter is in a critical

⁸⁸ See *id.*

⁸⁹ Conforti, "Non-Intervention", at 471-2. One assumes: "some economic sanctions programs might in fact prevent the people of the target from exercising free political choice." See Damrosch, "Nonintervention", at 47

⁹⁰ Damrosch, *id.* [emphasis added].

⁹¹ See Muir, "Boycott", at 203. See also Buchheit, "Nonviolent Coercion", at 50 [emphasis added].

situation. Accordingly, it is suggested that several factors concerning the target's situation deserve further examination. Hufbauer and Schott propose the alleged political and economic variables that may influence the outcome of sanctions. Those elements probably may assist.⁹² The first factor proposed is the situation of "political stability and economic health of the target country."⁹³ A relatively strong and stable country might have more strength to endure the impact of economic sanctions. Under the oil embargo applied by Arab States in 1970, the US proved, of course, strong enough to undertake the economic loss better than the other embargoed countries. Secondly, the "relationship between sender and target country,"⁹⁴ in particular, the commercial aspect, may serve as an important element in such an evaluation. Clearly, it is quite difficult for a State whose economic activities heavily rest on the export to or import from the sender to resist the pressure of interruption of regular commerce. Similarly, a nation that is used to depending on economic or financial aid might suffer seriously from the sudden termination of this sort of support.⁹⁵ Moreover, "the presence of international assistance to the target country"⁹⁶ could help to alleviate the damage caused by the economic sanctions. Of course, additionally, the shortage of mechanism of dispute settlement for the target nations also could reduce its ability to defy the sanctions. For example, a nation without GATT/WTO membership is unable to resort to the dispute settlement mechanism provided in the trade regime. It may be concluded that the determination of the occurrence of an economic coercion largely ought to depend on whether, under normal circumstance, a target is able to resist the pressure from the particular economic measure.

Overall, the objective test actually seems as sophisticated as the subjective criterion. It is obvious that any modification of the critical elements will lead to a differing judgment. The fair judgement on an economic action, thus, should be based on an impartial fact-finding. As Acevedo observes, the question "that perhaps would be best resolved by a case-by-case approach."⁹⁷

It should be noted that, however, the tests formulated above only represent a

⁹² See Hufbauer and Schott, *Economic Sanctions*, at 20.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Conforti, "Non-Intervention", at 472. Cf. Some author wonders that "[t]he unilateral suspension of economic assistance by the granting state be categorised as illegal when, in principle, states are not legally obliged to provide economic aid to other states." See Acevedo, "US Measures", at 337; Damrosch, "Nonintervention", at 47.

⁹⁶ See Hufbauer and Scott, *Economic Sanctions*, at 20.

⁹⁷ See Acevedo, "US Measures", at 337.

rudimentary experiment,⁹⁸ and need to be elaborated further by more wisdom, irrespective of legislative or judicial effort of international law.

(e) Summary and Remarks

It is true that States are not, in general, required to continue trade relations with unfriendly nations. But, while imposing economic sanctions, States run the risk of committing an illegal intervention. The wisdom of striking a balance between the maintenance of national discretion to use economic means for political purposes and the safeguard of sovereign freedom is always a necessity. In the light of the above analysis, it may be concluded that:

- (1) The rule that non-intervention may forbid the means of economic pressure has not yet been widely accepted.⁹⁹ It is believed, however, that certain types of economic coercion could operate to the extent that constitutes an impermissible intervention, which is evidenced in a number of the UN Declarations, bilateral and regional agreements. Although the proposition has not yet been confirmed by international tribunals, a careful observation of the *Nicaragua* case indicates that unlawful intervention shall include certain type of economic coercion.
- (2) The ICJ's ruling in the *Nicaragua* case, which has largely reflected the formulation of the UN instruments on non-intervention principle, suggests that the test for intervention hinges on whether the measure is coercive or not, rather than forcible or non-forcible (military or non-military). The tendency of the Court demonstrates that economic measures may be unlawful if they prove to be a method of coercion. In contrast, non-coercive economic means do not violate the rule of non-intervention. Accordingly, the Court's contribution to the definition of intervention highlights the importance of distinguishing between economic coercion with coercive nature and minor economic measures without coercive character.
- (3) It is admitted that the criterion to distinguish between permissible and

⁹⁸ See Lillich, "Economic Coercion", at 240.

⁹⁹ It has been strongly proposed that non-intervention principle has proscribed certain economic coercion. See e.g. Lillich, *id.* at 238; Damrosch, "Nonintervention", at 5; Farer, "Economic Coercion", at 411. By contrast, some commentators deny that customary law has evolved to prohibit the use of economic sanctions. See Elagab, *Non-forcible Counter-Measures*, at 212; *id.* "Coercive Economic Measures", at 692. McLaughlin, "Trade Sanctions", at 65. Neff takes a cautious position, being sceptical about the contention that there is now a rule of customary law forbidding the waging of economic warfare. See Neff, "Boycott", at 147. But, on the other hand, he admits that the norm of general customary law prohibiting economic warfare is an emerging one, if not definitive. See Neff, "Economic Warfare", at 90.

impermissible non-forcible measures under the rule of non-intervention has not yet been settled. The subjective and objective criteria proposed above only represent a rudimentary attempt aimed at deciding which use of economic pressure constitutes alleged "intervention". Satisfactory criteria deserve further effort and elaboration by subsequent decision and practice in similar cases in order to achieve a better result. It is conceded that the task appears quite complicated, since many factors need to be considered.

2 The assessment of Pelly sanctions against Taiwan under the principle of non-intervention

Assuming non-intervention principle might have applied to the use of trade sanctions, the section seeks to determine whether the imposition of the Pelly trade embargo against Taiwan was in breach of non-intervention by examining the criteria specified above.

(a) Subjective test

The intention of US's invocation of the Pelly sanctions against Taiwan can be largely seen from every stage of performing the Pelly sanctions, ranging from the imposition to lift of the sanctions. Upon the announcement of the sanctions against Taiwan, the US boldly set a timetable to pressure Taiwan to abide by certain requirements specified in the previous President's Message to the Congress. In doing so, it stated that Taiwan's subsequent progress would be closely reviewed in December of that year, and then a proper response would be made.¹⁰⁰ Furthermore, after the imposition of the sanctions, US officials continued to highlight those standards with which Taiwan was required to comply and declared that the sanctions could be lifted, maintained, or expanded according to Taiwan's subsequent response.¹⁰¹ Regarding the standards, the US, particularly, demanded that Taiwan amend its conservation law and strengthen enforcement actions.¹⁰² The US's dictation was rooted in the belief that Taiwan's penalty against the illegal trade was not tight enough to deter people from being engaged in trade of rhinos and tiger parts. It therefore requested a speedy passage of the amendment.¹⁰³ Moreover, as to the

¹⁰⁰ See President's Message to the Congress on Rhinoceros and Tiger by China and Taiwan (11 Apr. 1994) [hereinafter 1994 President's Message to Congress].

¹⁰¹ *Id.* See also *Central Daily News* (Taipei), 13 Apr. 1994, 3rd edition.

¹⁰² 1994 President's Message to Congress.

¹⁰³ See *id.*

enforcement's effectiveness, the US had the total discretion to decide whether Taiwan's subsequent effort is satisfactory enough to lift the sanctions.

The US's trade embargo on Taiwan did, admittedly, have variable purposes. Of course, the Pelly actions, as observed, were "to *send a message* to other countries that the United States wants them to take international conservation issues seriously."¹⁰⁴ More importantly, it was launched to penalise Taiwan for its environmental practices inconsistent with the US and CITES standards. Serving a preventive function, it also attempted to deter Taiwan's continuous failure to adopt crucial measures against illegal trade in the animal parts and products.¹⁰⁵ Overall, the sanctions aimed to coerce Taiwan into changing its national policy of wildlife conservation in conformity with the US's standards. On this basis, Taiwan may contend that the US's trade embargo carried with it the intention to interfere in the political operation of Taiwan.

By contrast, the US could argue that its actions were launched simply to follow the CITES's recommendation and enforce international environmental standards rather than intervene Taiwan's domestic affairs on the ground that the standards it highlighted was in consistent with those of the Standing Committee of CITES.

Nevertheless, Taiwan may argue that, first, it was, strictly speaking, not bound by the CITES's mandate.¹⁰⁶ Taiwan thus remains free to decide its conservation policy on rhinos and tiger species. The US intention's, even under the name of enforcing international law, still targeted the choices on which Taiwan has the freedom to decide. Secondly, even if Taiwan was subjected to the CITES's standards, the standards set by the US regarding the increase of penalty against offense went beyond those of CITES. As a result, the US actions at least seemed to reveal its intention to infringe Taiwan's national freedom on the sphere of legislation.

(b) Objective test

The assessment of the coercive nature of the Pelly sanctions upon Taiwan

¹⁰⁴ Charnovitz, "Pelly Amendment", at 795 [emphasis added]. See also Kenworthy, "China and Taiwan Warned on Endangered Species," Wash. Post. 8 Sept. 1993, at A 21; One commentator regarded that "In issuing the embargo against Taiwan, the United States demonstrated to Taiwan, as well as the entire international community, that wildlife protection and control of trade in wildlife and wildlife products is an international responsibility." See Patel, "Endangered Species", at 198, n. 267. Moreover, since the imposition of the Pelly sanctions against Taiwan, it was observed that a number of Asian countries, including China, Singapore, South Korea, Japan and Hong Kong tightened their enforcement actions by, *inter alia*, enacting tougher legislation and stiffer penalties against offences. See Cheung, "Tiger and Rhinoceros", at 138.

¹⁰⁵ See Schermers and Blokker, *International Institution Law*, at 1446; Zoller, *Unilateral Remedies*, at 106-7.

¹⁰⁶ See chapter two of the thesis.

probably may involve the following factors:

(i) *The damage inflicted on Taiwan*

The damage inflicted on Taiwan by the trade embargo is mainly related to real economic loss. The 1994 Pelly sanctions were imposed merely against the importation of selective wildlife products from Taiwan, covering tropical fish, edible frog legs, bird feathers and specimens, leather goods and decorations made of coral, shells and fish bones.¹⁰⁷ It was estimated that this action would cost Taiwan enterprises around US\$ 20 million a year.¹⁰⁸ As Taiwan's export to the US valued \$25.1 billion in 1993,¹⁰⁹ the trade measures affected less than 0.1% of the export. Admittedly, from a purely economic view, this was a tiny fraction of Taiwan's overall trade with the US,¹¹⁰ and the economic loss resulted from the trade sanctions seems quite minor.¹¹¹ Nevertheless, it should be noted that the import ban could be enlarged if Taiwan fails to match US's requirements in a specified period as indicated above. Since the US is the largest export market for Taiwan, roughly taking 30% of whole Taiwan exports value in 1993,¹¹² it is quite inconceivable that Taiwan could have endured the economic loss if a comprehensive import restriction against Taiwan had been imposed by the US, as the Pelly Amendment allows. Moreover, Taiwan officials feared that other States might be induced to adopt similar measures against Taiwan. Given its heavily trade-oriented economic strategy, Taiwan could find it difficult to resist the chain-reaction that definitely would jeopardise Taiwan's economy seriously.¹¹³

(ii) *Bilateral relationship between Taiwan and the US*

On the other hand, Taiwan may claim that a thorough determination of the coercive character of the Pelly sanctions should not only be limited to the scale of economic damage, but also should take broader contextual considerations into account. In Taiwan's case, there is a distinctive relationship between it and the US. Such factors to some extent may make a moderate trade damage turn to be coercion. Taiwan

¹⁰⁷ See United Evening News (Taipei), 10 Aug. 1994, 3rd edition.

¹⁰⁸ The 1996 *Republic of China Yearbook*, at 105.

¹⁰⁹ The N. Y. Times, 12 Apr. 1994, at D1.

¹¹⁰ *Id.*

¹¹¹ In 1993, the total exports of Taiwan amount to \$85 billion. See 1995 *Statistical Yearbook of the Republic of China*, at 241 [hereinafter *Statistical Yearbook*].

¹¹² *Id.*

¹¹³ Taiwan Daily News (Taipei), 18 Aug. 1994, 2nd edition.

could cite the political and economic interaction between it and the US to demonstrate how Taiwan has relied on the US to sustain and promote its development.

a. General development of the bilateral relations

In 1950, the outbreak of Korean War convinced the US that defending Taiwan constitutes an essential strategy to contain the expansion of communism in Asia. As a result, in the same year, US navy fleets were sent into the Taiwan Strait and the defense treaty between America and the ROC (Taiwan) was signed. Since then, they have worked as partners and allies to resist the possible invasion of communists as an effort to maintain the peace and security in the Western Pacific.¹¹⁴

For a long time, the US has been a firm proponent of Taiwan, both on security as well as economic sector. For instance, in international sphere, US supported Taiwan's holding the seat of China in the UN until 1971. To restore and strengthen Taiwan's capacity to defend itself, America had provided massive economic and military aids to Taiwan for decades.¹¹⁵ Under the imminent military threat of China communists, admittedly, Taiwan's incessant survival and development partly should be attributed to the security promised and substantial assistance warranted by the US. Consequently, of course, America has become the most influential nation to Taiwan.¹¹⁶

The official relations of Taiwan and the US had been maintained till America terminated the foreign relationship with Taiwan, and acknowledged the People's Republic of China (PRC) as the only legitimate representative of China in 1979.¹¹⁷ Therefore, the defense treaty was abrogated, and, certainly the US's "derecognition caused a temporary psychological shock" to Taiwan's people.¹¹⁸ Nevertheless, responding to the necessity and importance of making new arrangements to fill the vacuum left by the severance of official relations between two countries, the US Congress soon passed the Taiwan Relations Act (TRA).¹¹⁹ Serving a national legal basis for the US foreign policy toward Taiwan, the law declares US's commitment to

¹¹⁴ Chow, "ROC-USA Relationship", at 10.

¹¹⁵ See Clough, "US/Taiwan Relations", at 9.

¹¹⁶ See Chen, "Relationship of the USA and Taiwan", at 20.

¹¹⁷ The Background for the US to decide to recognise the PRC see Chow, "ROC-USA Relationship", at 11.

¹¹⁸ Simon, "Taiwan Relations Act", at 94.

¹¹⁹ This Act shall be effective as of 1 Jan. 1979. 22 U.S.C. 3301(note).

preserve peace, security and stability in the Western Pacific area¹²⁰ and promote unofficial relations between the US and Taiwan.¹²¹

Overall, it proves that the absence of US-Taiwan diplomatic relationship has not hindered the advance of their bilateral relations, particularly in commercial,¹²² cultural,¹²³ and technological¹²⁴ exchange. Instead, their substantial linkage becomes even closer and more cordial. Further evidence of such phenomena will be developed in the following sections.

b. Economic section

The commercial intercourse has never ceased to be the most substantial and tangible indication of bilateral connection between Taiwan and the US irrespective of the existence of an official relationship. In the early 1950s, the Taiwanese regime began to receive massive economic aids from the US. It helped the country shake off poverty and lay a basis for subsequent economic development.¹²⁵ Over the last few decades, foreign trade, in particular export activities, has played a vital role in Taiwan's economy. In the 1980s and early 1990s, Taiwan ran huge trade surpluses that swelled the island's foreign exchange reserves to among the one of the largest in the world.¹²⁶ It is evident that American's constant absorption of the significant portion of Taiwan's product has been contributing to that effect.¹²⁷ At the climax of such a trend, in 1983, over forty-eight percent of Taiwan's exports in value went to the US.¹²⁸ Even though Taiwan has endeavoured to diversify markets and reduce its trade dependency on the American market,¹²⁹ the US remains as Taiwan's largest export market.¹³⁰ On the other hand, American products are the second largest source of Taiwan's imports second to Japan.¹³¹ Overall, the US is the Taiwan's single largest trading partner, while Taiwan presently ranks sixth largest among US trading

¹²⁰ See 22 U.S.C 3301.

¹²¹ *Id.*

¹²² See The 1998 ROC Yearbook, at 153.

¹²³ *Id.*

¹²⁴ Taiwan and the US, via unofficial institutions, namely American Institution in Taiwan (AIT) and Coordination Council for North American Affairs (CCNAA) (now it has been changed to Taipei Economic and Cultural Representative Office), have signed about 40 scientific and technological (S&T) agreements during 1979 to October 1990. See Bellocchi, "Taiwan-US Relationship", at 4.

¹²⁵ See Bellocchi, *id.*

¹²⁶ The 1995 ROC Yearbook, at 165.

¹²⁷ See Statistical Yearbook, at 240-41.

¹²⁸ *Id.* at 240.

¹²⁹ See The 1996 ROC Yearbook, at 166.

¹³⁰ *Id.*

¹³¹ See Statistical Yearbook, at 239.

partners.¹³² It is predictable that the situation seems hard to be modified in a short term. Indeed, both countries have established solid economic connection, which makes the bilateral interdependence on trade become increasingly prominent. Yet, obviously, Taiwan's economy has more reliance on the health of the US economy than the latter on the former, despite Taiwan does retain some relatively weak economic bargaining powers against the US.

c. Security section

Since China was separated into two regimes, the PRC on Mainland China and the ROC on Taiwan in 1949, the hostility between the two sides has never ceased. To forge a friendly atmosphere in the Taiwan Strait, Taiwan had already proclaimed that military actions against China communists in an attempt to reclaim Mainland China be abolished.¹³³ In contrast, PRC has not yet renounced the option of resorting to force to achieve unity.¹³⁴ Faced with the security threat from the PRC, Taiwan's continuous reliance on US's military support against China communists marks the close connection between the two countries in the security affairs.

Before the US switched recognition from Taiwan to the PRC, it was the Sino-US defense treaty which assured the peace and security of Taiwan. Since 1979, the US's commitment to protect Taiwan's peace and security has been transformed from the treaty's obligation into the implications embodied in its national law, the TRA. The US policy declared by the law on the security issue comprises:

1. to declare that peace and stability in the Western Pacific are in the political, security and economic interests of the United States;
2. to make clear that the US decision to establish diplomatic relations with the PRC rests upon the expectation that the future of Taiwan will be determined by peaceful means;
3. to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security in the western Pacific and of grave concern to the US;
4. to provide Taiwan with arms of a defensive character;
5. to maintain the capacity of the US to resist any resort to force or other forms of

¹³² See The 1996 ROC Yearbook, at 165-66.

¹³³ In 1991, President Lee declared the termination of the Period of National Mobilisation for Suppression of Communist Rebellion, effective on 1 May 1991.

¹³⁴ Paying his recent state visit to the US in 1997, the PRC President, Jiang Zemin still stuck to the dogged policy of maintaining the use of force to unify China. See *Time*, 10 Nov. 1997, at 64.

coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.¹³⁵

While the law demonstrates US's overwhelming and sincere concern on the security of Taiwan, the ceaseless supply of defensive arms to assist Taiwan to exercise self-defense is the most tangible and pragmatic promise made by the US. Moreover, it should be noted that the US must take appropriate action if any threat to Taiwan occurs according to the section 3 of the TRA. The following presents the details of the US's fulfillment of the security commitment toward Taiwan under the TRA.

Arms sale to Taiwan

Based on the Taiwan's actual needs solely, the arms sale under the TRA is confined to the extent that it may enable Taiwan to maintain a sufficient self-defense capability.¹³⁶ Therefore, it sends at least two primary messages. Firstly, offensive weapons may not be included in the arms sale list. Also, the judgement of Taiwan's needs has to take into account the relative advance of the PRC's force and be dominated by the mandate that a balance of military force on both sides can be achieved. Generally speaking, the US has been fulfilling its policy of selling defensive arms to Taiwan in despite of repeatedly vigorous protest launched by the PRC.¹³⁷ Although the Taiwan government has devoted itself to procuring weapons from other countries, the result seems unsatisfactory.¹³⁸ Much evidence indicates that most countries' incapability of resisting the pressure from the PRC has thwarted the deal. In contrast, upheld by the US's promise in the domestic law and foreign policy, undoubtedly, arms supplied by the US have become the most reliable and predictable source to meet Taiwan's security needs.

The US's security commitment to the Taiwan while the threat to Taiwan occurs

It is admitted that by equipping Taiwan with necessary defensive arms, the TRA security framework centers on the assurance of Taiwan's having enough self-defense ability to counter any security threat.¹³⁹ It is also designed to curb the attempt of the

¹³⁵ See 22 U.S.C. 3301.

¹³⁶ See 22 U.S.C. 3302.

¹³⁷ Based on the PRC-US joint communiqué on 17 Aug. 1982, PRC insists that the present practice of US arms sale to Taiwan has violated the spirit of the communiqué, which underlines the US's intention to reduce the amount and quality of arms supply to Taiwan.

¹³⁸ Until now, on advanced arms articles, Taiwan has only purchased submarines from Holland and jet fighters and war ships from France except the US. But, currently, under the pressure of the PRC, these two nations have decided not to have further arms deal with Taiwan.

¹³⁹ See Sun, "Taiwan Strait's Security", at 57.

PRC to take military actions against Taiwan.¹⁴⁰ In addition, in order to preserve Taiwan's security thoroughly and cope with any unpredictable situation that will threaten the security of Taiwan, the TRA does provide another device to further the objectives of the law. Unlike the revoked defense treaty, the TRA does not explicitly demand that the US be required to use its military force to defend Taiwan once any military attack occurs. Instead, it commits the US to adopt measures appropriate in response to any threat to Taiwan to ensure peace and security of the area.¹⁴¹ The mechanism allows the US to retain more flexibility in handling crisis in the Taiwan Strait, which varies according to the exact conditions and its own discretion.¹⁴² Moreover, it expands the range to which the US has to respond from military attack to "any threat to the security or the social or economic system of the people on Taiwan"¹⁴³ caused by non-peaceful means, including boycotts or embargoes.¹⁴⁴ Thus, not surprisingly, some may contend that the security guarantee provided by the TRA to Taiwan theoretically might be no less than the previous defense treaty.¹⁴⁵

Probably, it is unrealistic for Taiwan people to anticipate US's involvement in Chinese military conflict by sending armed forces to defend Taiwan.¹⁴⁶ But, it seems conceivable that under the mandate of the TRA, the US administration is required to respond to any critical situation threatening Taiwan's security whenever the law is valid. To most people in Taiwan, therefore, it makes sense that Taiwan's eventual safety to some extent depends on the US's strong support regardless of what sort of form. The following incident that happened recently can best illuminate the phenomenon.

The US's involvement in 1996 Taiwan Strait crisis

In 1996, the PRC launched several ballistic missiles into seas off Taiwan and held massive naval and air manoeuvres with live ammunition in the Taiwan Strait, which aimed to intimidate Taiwan's first presidential elections and thwart its

¹⁴⁰ *Id.* at 59.

¹⁴¹ See Section 3 of the TRA, 22 U.S.C 3302; The measures are assumed to include forcible and non-forcible actions, such as revoke of recognition on the PRC, economic sanctions and military actions. See *Id.* at 60.

¹⁴² See Sun, "Taiwan Strait's Security", at 60.

¹⁴³ Section 3 of the TRA, 22 U.S.C. 3302.

¹⁴⁴ Section 2 of the TRA, 22 U.S.C. 3301.

¹⁴⁵ See Sun, "Taiwan Strait's Security", at 61-3.

¹⁴⁶ Cf. President Lee of the ROC (Taiwan), in recent interview with The Times, believes "if China attacked, he would expect America to defend Taiwan." See The TIMES, 10 Nov. 1997, at 14.

increasing movement to seek wider international recognition.¹⁴⁷ Even though there was no evidence that the PRC would invade Taiwan at that moment,¹⁴⁸ this offensive and risky action soon aroused much international concern.¹⁴⁹ While most countries' reaction was merely confined to oral protest, America presented itself as a unique nation who meddled in the situation directly and aggressively. The US's resolve in this crisis gives an excellent opportunity to examine how it fulfills the promise proclaimed in the TRA.

As the military exercise of the PRC became intensified, the US Clinton Administration dispatched a powerful naval force to this critical region to express Washington's grave concern about the risky situation. The US force sent to the waters off Taiwan was estimated to be the largest force assembly in the region since the Vietnam War.¹⁵⁰ With the PRC's growing force demonstration, it was believed that the risk of an escalating tension probably leading to a military confrontation could not be ruled out.¹⁵¹ A tough question was raised as to whether the US would use its force to defend Taiwan. Stressing battle groups would be in "a position to be helpful",¹⁵² the US Administration "remained deliberately vague about the depth of its commitment to the defense of Taiwan,"¹⁵³ and declined to specify what exact actions it will take once Taiwan is under attack. Actually, this policy of "strategic ambiguity" appears embodied in the TRA, which, as mentioned, gives the US flexibility to deal with any security crisis on Taiwan. The US Congressmen, however, adopted more explicit and definite stance upon the crisis. They passed a non-binding resolution to urge the Clinton Administration to defend the island if it is attacked, stating the US "should assist in defending [the Taiwan Government and people] against invasion, missile attack or blockade by China".¹⁵⁴ It seems clear no matter the US

¹⁴⁷ See Pringle, "Chinese missiles target elections in fearful Taiwan", *The TIMES*, 9 Mar. 1996, at 14.

¹⁴⁸ See Pringle, "Second US carrier sails for Taiwan", *The TIMES*, 12 Mar. 1996, at 1

¹⁴⁹ See *id.*

¹⁵⁰ At the climax of the PRC military exercise, there were two aircraft carriers battle groups with ten warships and a submarine escorting them, totaling at least 10,000 men, 140 aircraft and 200 Tomahawk cruise missiles. See Pringle, "Second US carrier sails for Taiwan", *The TIMES*, 12 Mar. 1996, at 1.

¹⁵¹ According to Western intelligence sources, China intensive military exercises might turn out to be four offensive actions, including a naval blockade, an amphibious landing on one of the offshore islands of Taiwan, a missile attack on key targets in Taiwan, and a full invasion of Taiwan. See Evans, "China offensive cannot be ruled out, experts say", *The TIMES*, 15 Mar. 1996, at 14.

¹⁵² See the remark by Warren Christopher, American Secretary of State. Pringle, "China warns US of 'wrong signal' with big naval build-up", *The TIMES*, 13 Mar. 1996, at 13.

¹⁵³ Rhodes, "Chorus grows on Capitol Hill for clear commitment to Taipei", *The TIMES*, 13 Mar. 1996, at 13.

¹⁵⁴ Evans, "China offensive cannot be ruled out, experts say", "China offensive cannot be ruled out, experts say", *The TIMES*, 15 Mar. 1996, at 14.

Administration's vague policy or Congress's firm declaration has entirely guaranteed its substantial involvement in any issue relating to the security of Taiwan.

Under the threat of China's military exercise, Taiwan greatly suffered from psychological stress.¹⁵⁵ While no international mechanism of settling the dispute proves available to the island, it is undoubted that Taiwan shall welcome US's concern exposed by deploying its force in the critical area.¹⁵⁶ The incident simply discloses that Taiwan's security inherently and greatly relies on the US's commitment to safeguard the island as long as the PRC's resolution to unify China by force remains as one of the options.

d. Remark

In conclusion, it is clear that Taiwan remains substantially dependent on the support of US to sustain its development. Of course, Taiwan is not entirely dominated by the US. It is true, however, that Taiwan's constant and heavy reliance on the US, particularly in economic, security and psychological matter, leaves it, in most circumstances, fundamentally unable and unwilling to resist any coercive measures imposed by the latter. Therefore, Taiwan may contend that the sanctions with tremendous impact appear so penetrating and coercive as to be objectively capable of modifying its sovereign freedom.

(c) Concluding remarks

It is true that the ICJ, in the *Nicaragua* case, denied the illegality of the US's economic sanctions against Nicaragua under the principle of non-intervention. If the Court were inclined to make constant reference to its own judgement in the *Nicaragua* case,¹⁵⁷ the claim against economic sanctions based on the principle might be rejected. Nevertheless, it should be borne in mind that the *Nicaragua* decision did not lay down an absolute rule that the use of economic sanctions would never violate

¹⁵⁵ The impact of the PRC military exercise against Taiwan can be best shown in a considerable plunge of Taiwan financial markets. The stock index and foreign currency reserves fell drastically when the provocative actions became intense. See Pringle, "Second US carrier sails for Taiwan", *The TIMES*, 12 Mar. 1996, at 1.

¹⁵⁶ A Foreign Office spokesman remarked: "We support the sensible precautions being taken by the United States in this dangerous situation." See Pringle, "China fires missile", *The TIMES*, 13 Mar. 1996, at 1.

¹⁵⁷ Actually, in practice, the precedent of international judicial decision obtains considerable weight. It is admitted the World Court, like the other tribunals, does rely on the judicial view of the precedent. In this respect, some writers note that "[l]ike many civil law courts, the International Court follows a doctrine known in France as a *jurisprudence constante*, rendering decisions that are sequentially consistent." See Janis, *International Law*, at 82, 141.

the doctrine of non-intervention. Thus, it is not impossible that the Court could look to special circumstances of particular cases to find that economic measures could amount to intervention. It is possible—though of course far from certain—that the American Pelly sanctions against Taiwan might constitute such a special circumstance.

In sum, whether the Pelly sanctions against Taiwan constituted impermissible intervention largely depends on whether the trade embargo amounted to coercion. If the Court only considers the factor of actual economic loss, the US Pelly trade embargo might not constitute a measure of coercion due to the relatively small scale of trade damage in the overall context of trade between Taiwan and the US. As a result, the US action would not be prohibited intervention. On the other hand, if the Court takes a variety of elements into its assessment, including bilateral relationship, it might reach an opposite conclusion. Given the rather insufficient elaboration of 'coercion' in the context of intervention and of economic sanctions, the approach indicated above represents a legal theoretical analysis.

D Abuse of rights

1 The notion of the principle

The third general principle which might be relevant to unilateral economic coercion is abuse of rights. The principle derives from municipal legal systems, mainly the French civil law, under the rubric of *abus de droit*, and the German civil law as *Rechtsmissbrauch*. The principle seeks to outlaw the exercise of a right that carries the intention to "inflict harm on another," or enable the acting State to "seize unjustifiable interest."¹⁵⁸ It is true that there has been but a short period of promoting the incorporation of the principles of national law into that of international law.¹⁵⁹ In practice, however, the notion of abuse of rights has been involved in the determination of State responsibility by international tribunals.¹⁶⁰ As Lauterpacht observed, "the Court has not hesitated to associate itself--although not conspicuously

¹⁵⁸ See McWhinney, "Co-operation", at 428.

¹⁵⁹ The Greek Professor Politis in French Universities is believed to pioneer the study of promoting the notion of abuse of rights as source of international law. See McWhinney, *id.* at 428-29.

¹⁶⁰ As a writer observed, the international responsibility "occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage." Oppenheim, *International Law*, at 345. The relevant international judicial decisions referring to the principle cover variable range of national discretion. See e.g. Lauterpacht, *International Law*, at 162-65; Oppenheim, *id.* at 345-46; Brownlie, *International Law*, at 444-46.

or directly --with the doctrine of abuse of rights."¹⁶¹ With respect to its legal status, the majority of writers agree that it is one of the "general principles of law recognised by civilised nations,"¹⁶² which serves a secondary source of international law according to the Statute of ICJ.¹⁶³

Yet several doubts remain concerning the applicability of the rule. There is no fixed definition as to what sort of conduct constitutes an abuse that should be denounced by international law.¹⁶⁴ Neither does international law reveal the exact scope and extent of its application.¹⁶⁵ Thus, not surprisingly, to preserve the integrity of existing rules of law, several writers tend to reject the adoption of such an abstract and vague notion.¹⁶⁶ Further, as far as the protection of international environment is concerned, it is contended that the initial thought of connecting the prohibition of abuse of rights with liability for transboundary pollution has diminished.¹⁶⁷

Nevertheless, its function to fill the legislative vacuum in international law remains.¹⁶⁸ As Janis comments: "As gap filler, general principles of law are more a feature of court cases than of other kinds of international legal process."¹⁶⁹ Thus, it appears unnecessary and impractical to make every effort to formulate the normative rules for the principle of abuse of rights in the regular legislative process, such as its definition, extent and effect etc. Instead, this should be left to the courts. The observation by Lauterpacht has generally underlined the search for a real application of the doctrine:

The determination of the point at which the exercise of a legal right has degenerated into abuse of a right is a question which cannot be decided by an abstract legislative rule, but only by the activity of courts drawing the line in each particular case. The exercise of such activity—which, in relation to any new set of circumstances, may assume the complexion of judicial legislation—is particularly important in the international society in which the legislative

¹⁶¹ See Lauterpacht, *id.* at 162.

¹⁶² See Oppenheim, *International Law*, at 346-47; Brownlie, *International Law*, at 445; Henkin *et al*, *International Law*, at 115; Cf. Some conclude that "In view of the diversity on this subject in the municipal laws of civilised countries, it would also be difficult to accept the proposition that the prohibition of the abuse of rights is a general principle of law recognised by civilised nations." See Schwarzenberger and Brown, *International Law*, at 85.

¹⁶³ ICJ Statute, Art. 38 (1)(c).

¹⁶⁴ See Schwarzenberger and Brown, *International Law*, at 84.

¹⁶⁵ See Oppenheim, *International Law*, at 347; Schwarzenberger, *International law and Order*, at 84-85.

¹⁶⁶ E.g. Schwarzenberger, *id.* at 99-100; Henkin *et al*, *International Law*, at 553.

¹⁶⁷ See Henkin, *id.*

¹⁶⁸ See Janis, *International Law*, at 55-58.

¹⁶⁹ *Id.* at 57.

process by regular organ is practically non-existent.¹⁷⁰

For the purpose of the study, it is required to explore how the rule would be properly applied to the exercise of unilateral economic sanctions that inevitably will inflict damage on the target State. In the case of 1926 *Certain German Interests in Polish Upper Silesia*,¹⁷¹ the Permanent Court of International Justice (PCIJ) rejected the Polish contention that there had taken place an abuse of right by Germany's disposition of a State's property in the area where the sovereignty would be transferred. It found that the German acts of alienation did not overstep the limits of the normal administration of public property, and that they were not designed to *procure for Germany an illicit advantage and to deprive Poland of a right to which she was entitled*.¹⁷² On this basis, the general imposition of economic sanctions might not be in breach of the principle. That is because, in most circumstances, the unilateral use of economic sanctions is not necessarily motivated by the desire to damage or deprive the targeted country of a right or interest. Rather, in most cases, it was launched to change the behaviour of the target. Besides, the coercive measures normally would not bring any benefits to the acting State.

But, it should be noted that the imposition of economic pressure might be so detrimental as to lead to unacceptable impacts upon the target nation. Therefore, it is extremely desirable that the contemporary appliance of the rule of abuse of rights should extend to the limitation on the deliberate use of economic means whenever a large disparity of power among nations prevails. Such necessity increases especially if economic sanctions were launched by the powerful State who is capable of enduring the economic loss, and the action consequently caused immense damage to the victim State suffering the irrecoverable loss. In effect, it may be suggested that an *effect* test alone should determine the existence of the abuse of rights, even though the sanctions fall short of a clear intention of impairing the interests of the target country.

To attain a modest revision of the original requirements of the doctrine, a further condition may be added to the extent that the acting State must be capable of foreseeing the result caused by its action under normal situations. In the current

¹⁷⁰ Lauterpacht, *International Law*, at 162. It has been stressed that [t]he extent of the application of the still controversial doctrine of the prohibition of abuse of rights is not at all certain. It is of recent origin in the literature and practice of international law, and it must be left to international tribunals to apply and develop it by reference to individual situations." Oppenheim, *International Law*, at 347.

¹⁷¹ PCIJ Rep. 1926, Ser. A, no. 7, at 30.

atmosphere, it is probably not easy for international tribunals to accept such an innovation. It is always, however, desirable for the international community to modify the principle in order to accommodate any new emerging circumstances with which traditional concept of abuse of rights cannot deal.

2 The Pelly sanctions against Taiwan under the principle

A tribunal may be unable to support Taiwan's contention that there had occurred the offence of an abuse of right committed by the US's environmental sanctions. This is mainly because that the principle traditionally requires a primary intention to damage the interests of another State. Of course, the US may claim the use of economic pressure was not primarily designed to inflict damage upon Taiwan, but to force Taiwan to advance its environmental practice of protecting endangered species. So, the US considers any economic injury inflicted on Taiwan only as a means to achieve the goal rather than the objective of the action. Indeed, given that the Pelly legislation is explicitly enacted to promote international conservation programme, such as CITES,¹⁷³ Taiwan will find it difficult to persuade the Court that the imposition of Pelly sanctions were driven by the intention to impair the interests of Taiwan, regardless of certain material damage inflicted on Taiwan by the sanctions.

Even assuming that an effect test is the way to determine the existence of abuse of rights, a tribunal still probably would not favour Taiwan's claim after taking into account the actual loss inflicted on Taiwan. Unlike the imposition of general trade embargoes, the actual damage of Pelly sanctions against Taiwan appeared quite modest and did not cause irrecoverable economic loss to Taiwan. At the present stage, it may be concluded that the Pelly sanctions upon Taiwan hardly constituted an abuse of rights.

It is true that conventional scholarship or judicial decision barely address the relevance of the principle to the unilateral use of economic sanctions. Due to the absence of a sufficient and widely recognised legal basis for applying such a norm to economic coercive measures, it is admitted that the principle may not offer a feasible basis for Taiwan to seek justice and a suitable remedy. Nonetheless, at least, currently, the necessity of studying this issue remains unless the international society is willing to tolerate any undesirable abuses of national rights in conducting its

¹⁷² *Id.* at 38 [emphasis added].

¹⁷³ 22 U.S.C. 978 (a)(2).

economic affairs.¹⁷⁴

¹⁷⁴ One concludes that States are legally precluded from taking measures that would otherwise be permitted if such measures would inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage. See Oppenheim, *International Law*, at 345.

Conclusion

On the basis of general rules of international law, it seems that Taiwan may encounter substantial hurdles in challenging the Pelly sanctions successfully. The prohibition against use of force was, in all likelihood, not breached by the US's Pelly action against Taiwan. Further, the ICJ has not yet confirmed the possibility that economic sanctions could amount to unlawful intervention. However, according to the criteria established by the World Court for determining a prohibited intervention, an argument can be advanced that, in the particular case of application of Pelly sanctions by the US, there might be a breach of the non-intervention principle. Certainly, the Pelly sanctions infringed Taiwan's freedom, particularly regarding its sovereign discretion over domestic legislation on conservation.

The crucial issue is whether the US's Pelly action amounted to coercion. If the Court inclines to confine the fulfillment of coercion to real economic loss inflicted on target, then the US's action could probably not be held to be coercive. If, however, other factors than material economic loss were taken into account, such as general bilateral relations, it perhaps may be concluded that the Pelly sanctions were coercive because the unique relations between Taiwan and the US make the former unable to resist any pressure from the US, irrespective of the material magnitude of sanctions being imposed. The difficulty of conducting a precise and objective appraisal of the overall bilateral relations, admittedly, remains. This difficulty might dissuade tribunals from embarking upon such an analysis. It is submitted, however, that the legality of economic pressure cannot be assessed thoroughly without carefully taking into account all the relevant factors surrounding the matter.

In addition, the determination of abuse of rights is also highly reliant on the relevant facts of each particular case. In Taiwan's case, it seemed difficult to maintain that the US action breached the norm. It should be noted that, however, by the exercise of the Pelly Amendment, a trade embargo could become extremely detrimental to the target nation whenever it operates to an imposition of a total import ban.¹⁷⁵ Hypothetically, if a nation has long relied on its exports to the US to sustain its economy, an abrupt termination of all imports against the former should be considered as an abuse of rights. The particular situation suggests that, ultimately, the use of Pelly sanctions could be in danger of being accused of constituting abuse of

¹⁷⁵ 22 U.S.C. 1978 (a)(4).

rights as long as the discretion of the US President to expand any kinds of trade sanctions to a comprehensive import ban remains.

PART THREE: THE PELLY SANCTIONS AND SPECIAL REGIMES

Chapter 4

The Implication of International Trade Law

Introduction

During the past decade, trade measures have been frequently used to counteract national policies that may have adverse impact on the international environment. Anderson and Blackhurst made a distinction between trade restrictions and trade sanctions, which were imposed for environmental purposes.¹ In effect, the 1991 and 1994 US prohibition on imports of tuna products and its recent shrimp embargo could be largely classified as "trade restrictions," which responded to the harvesting process endangering marine species of dolphins and sea turtles. The Pelly Amendment trade embargo imposed against Taiwan's insufficient efforts to protect endangered species in 1994 was a typical model of "trade sanctions". The main difference between the tuna and shrimp embargoes, on one hand, and the Pelly sanctions, on the other, concerns the measures on the embargoed products themselves. The tuna and shrimp restrictions affected products whose production and processing methods are environmentally harmful. The Pelly sanctions, in contrast, targeted unrelated products. The latter, in other words, may be said to have been "purely an exercise of power and leverage."²

In contrast to other general international rules, contemporary trade law has formulated some relatively specific rules designed to directly regulate the national use of trade measures. Two regimes of trade agreement—multilateral and bilateral—may be relevant to the current study. As to the former, along with the creation of the World Trade Organisation (WTO),³ the trade measures adopted by its members certainly are subject to the rules of the General Agreement on Tariffs and Trade (GATT) 1994.⁴ Indeed, the Pelly sanctions against Taiwan could not have been a violation of the GATT provisions due to the non-GATT/WTO membership of

¹ See Anderson and Blackhurst (ed.), *Greening World Trade*, at 18, 140, 261; Esty, *Greening GATT*, at 103.

² Esty, *id.* at 103.

³ After the conclusion of the Uruguay Round of trade negotiations, the World Trade Organisation succeeding the General Agreement on Tariffs and Trade (GATT) was established on 1 Jan. 1995. The legal framework of the WTO can be located in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* [hereinafter Uruguay Text].

⁴ GATT 1994 was formally adopted at the 1994 Marrakesh Conference creating the WTO. The agreement incorporated the original 1947 GATT with certain amendment. See Uruguay Text, *id.* at 486.

Taiwan. Nevertheless, the problem of potential conflicts between the multilateral trade rules and the sanctions is an important one. China and Taiwan will join the WTO in the near future. As observed, "[t]heir wildlife trade, whether in rhino horn and tiger bone or other species, will continue to be a concern long after they accede to the WTO."⁵ Further, it should be noted that, as indicated, a number of the WTO members, like Japan, South Korea and Norway, have been repeatedly threatened by the sanctions, since the Pelly legislation came into force. In the foreseeable future, a Pelly sanction may still be imposed against a WTO member. Thus, it is rightly remarked that "trade sanctions had never been imposed under the Pelly Amendment until the recent sanctioning of Taiwan. Therefore, the conflict between Pelly and the GATT is less remote than previously contemplated, when the Pelly Amendment had not been invoked."⁶ As a result, it is worth assessing the legality of the hypothetical case of the Pelly sanctions against Taiwan under the WTO/GATT rule.

As to bilateral treaty, prior to the 1950s, the Friendship, Commerce, and Navigation (FCN) treaties were the most significant bilateral agreements governing mutual economic relations.⁷ These agreements aim at promoting and safeguarding the mutual intercourse of commerce. Restrictions on trade measures constitute one of the principal premises embodied in the FCN treaties. The 1946 FCN treaty between the United States and the Republic of China (Taiwan)⁸ was one of the same school of the bilateral commercial agreements concluded by the US with its commercial partners.⁹ Thus, Taiwan perhaps may seek a remedy by claiming that the Pelly trade embargo violated the US's treaty commitment towards Taiwan.

With regard to trade rules, the common structure and features shared by the multilateral and bilateral regimes are apparent. In terms of structure, they both address the basic principles limiting national trade policy at the primary stage and,

⁵ Crawford, "Rhinoceros and Tiger Trade", at 578.

⁶ *Id.*

⁷ See Jackson, *World Trading System*, at 34. In addition to the FCN treaties, other bilateral agreements have been developed to facilitate mutual economic intercourse, generally including sectoral trade agreements, investment promotion and protection treaties, and industrial, scientific/technical, and economic cooperation agreements. See Herrmann, *Commercial Treaties*, at 89-91.

⁸ Treaty of Friendship, Commerce and Navigation between the United States of America (US) and the Republic of China (ROC), 63 U.S.T. 1299, TIAS 1871, signed at Nanking in 4 Nov. 1946; entered into force in 30 Nov. 1948 [hereinafter FCN treaty between the US and The ROC]. It should be noted that the term of "the Republic of China" and "Taiwan" are interchangeable in this study.

⁹ The early effort for the US to conclude the FCN treaties could be dated from the late eighteenth century, namely the 1794 Jay Treaty of Amity, Commerce, and Navigation, which was originally negotiated with England and still binds the US and Canada. See Janis, *International Law*, at 281. As of 1990, the US has entered into the FCN treaties with over 40 countries. See US Department of State,

then, specify exceptional clauses under which inconsistent measures may be justified. In substance, most-favoured-nation (MFN) and national treatment principles heralded by the FCN treaties have been effectively incorporated into the WTO/GATT mandate, which, as remarked, “became pillars of the GATT structure.”¹⁰ Several decisions delivered by the WTO/GATT, as mentioned, have contributed to clarification and elaboration of the GATT rules regarding the use of environmental trade measures. In contrast, very few cases, apart from the *Nicaragua* case, have been brought to international tribunals, such as the International Court of Justice (ICJ),¹¹ concerning the legality of trade embargoes under bilateral FCN treaties, let alone measures imposed for environmental purposes. The scant jurisprudence, therefore, constrains the extent of the current research. Also, the lack of substantial precedents will increase the difficulty in assessing the consistency of the Pelly-type sanctions with the bilateral agreement properly. Nevertheless, given the similar legal formation between the FCN treaties and the GATT rules on trade issues, it seems that, to some extent, certain jurisprudence of the latter may assist the interpretation and application of the rules of the former upon the use of environmental trade measures. Accordingly, for the sake of expedience, this chapter will discuss the multilateral GATT/WTO rule first, followed by the FCN treaty.

Multilateral Agreement-WTO/GATT

Treaties in Force 1990, 1-275.

¹⁰ Jackson, *World Trading System*, at 35.

¹¹ Pursuant to Article 28 of the FCN treaty between the US and the ROC, the ICJ shall govern the dispute settlement unless the contracting parties agree to settlement by other pacific means. The Court had dealt with the assertion of the violation of FCN obligations in the *Hostage* and *Platform* cases. But, none of them involved with the use of trade measures.

Although the use of trade sanctions had been brought to the GATT's attention,¹² the WTO/GATT regime has not yet squarely addressed the legality of environmental trade sanctions. Nonetheless, in reality, the use of "trade restrictions" had been under scrutiny of its rules in the past decade. The two *Tuna/Dolphin* cases,¹³ as well as the *Shrimp/Turtle* case,¹⁴ represent the most notable decisions. Regardless of the distinction between "trade restrictions" and "trade sanctions," they share a common nature of economic embargoes designed to force a change of national environmental conduct.¹⁵ The GATT/WTO jurisprudence enunciated from the above cases, therefore, might facilitate the assessment of the consistency of an environmental sanction with the GATT rules.

The section first focuses on the examination of the applicable WTO/GATT rules to the dispute. The tasks begin with the study of the basic trade principles that may be applicable to the dispute aroused by environmental trade embargo, normally in the form of imports ban. Then it will proceed to analyse the provisions of general exception that may serve a basis to justify those trade measures that have been in breach of the WTO/GATT's primary obligations. Finally, for a hypothetical study, the consistency of the Pelly sanctions against Taiwan with the WTO/GATT will be assessed.

A The fundamental principles of the WTO/GATT

1 Non-discrimination principles of Article I and III

¹² Trade embargoes strikingly used for national security reason had been brought to the GATT's attention in the 1980's Nicaragua case. See United States--Imports of Sugar from Nicaragua, the Panel Report, adopted on 13 March 1984, BISD/31S/67.

¹³ United States--Restrictions on Import of Tuna, the Panel Report, 3 Sep. 1991, GATT, DS21/R, not adopted [hereinafter *Tuna I*]; United States--Restrictions on Imports of Tuna, the Panel Report, 16 June 1994, DS29/R, not adopted [hereinafter *Tuna II*].

¹⁴ United States--Import Prohibition of Certain Shrimp and Shrimp Products, the Panel Report, 15 May 1998, WT/DS58/R [hereinafter *Shrimp* Panel]; United States--Imports Prohibition of Certain Shrimp and Shrimp Products, the Appellate Body Report, 12 Oct. 1998, WT/DS58/AB/R [hereinafter *Shrimp* App.].

¹⁵ The Appellate Body observed that the US shrimp embargo "is designed to influence countries to adopt national regulatory programs . . . by their shrimp fishermen." See the *Shrimp* App., para. 138. Further, emphasizing "its intended and actual coercive effect on the specific policy decisions made by foreign government, the tribunal noted that the measure "[i]s, in effect, an economic embargo . . ." *Id.* para. 161. Similarly, according to the Japan's submission to the *Tuna I* case, the US tuna embargo was regarded as a sanctions mechanism to force other countries to adopt policies set by the US. See the *Tuna I*, at para. 4.19.

The elimination of discriminatory treatment is the core mandate of the WTO/GATT regime embodied in GATT 1994.¹⁶ The document specifies two fundamental non-discrimination principles. Article I, the most-favoured-nation (MFN) principle, requires equal treatment between like products originating in or destined for the territories of all other contracting parties. The national treatment principle of Article III prohibits discrimination between imported products and the like domestic products. It is clear that the discrimination prohibited by these articles is between "like products." Thus, discrimination may be permissible if products are not alike.

As the economic and development discrepancy between countries remains, the same products may be produced by different methods causing various environmental impact.¹⁷ The problem thus may be raised as to whether production process or method is able to affect the likeness of a product. If the method of production may be allowed to make the essentially same products legally not like, it implies, under GATT 1994, the products produced by an environment-unfriendly method may be treated differently without violating Article I or Article III.¹⁸

The GATT/WTO practice, however, indicates that the trade regime have not yet endorsed such broad view. The prevailing view of the trade regime discloses that the concept of "like product" is still confined to the physical characteristics of the products themselves rather than their method of production. A 1971 GATT study remarked that the low price of goods produced by a country without sufficient environmental regulations is simply that country's competitive advantage, and may not be deemed unfair.¹⁹ Further, the approach was confirmed by the *Tuna/Dolphin* case. The panel concluded that the tuna harvested by Mexican vessels was "like" tuna harvested by US vessels, despite the fact that the incidental taking of dolphins by Mexican vessels in the production process did not correspond to that of US vessels.²⁰ Therefore, in assessing the GATT-consistency of a trade-related environmental measure, the measure discriminates between like products based on their method of

¹⁶ See the preamble of GATT 1994.

¹⁷ McDonald, "Greening GATT", at 409-10; Jackson, *World Trading System*, at 235-36.

¹⁸ See Research and Policy Comm., Comm. for Economic Dev., *Breaking New Ground in US Trade Policy* 73 (1991).

¹⁹ Industrial pollution Control and International Trade, GATT Studies in International Trade No 1, at 23 (1971).

²⁰ *Tuna I*, at para. 5.15.

production may be in breach of GATT's non-discrimination obligations.²¹

As the direct import ban against products produced by an environmentally unfriendly method has been used to influence other nations' policy, the following discussion attempts to reveal whether in practice those GATT principles may apply to the trade restrictions.

(a) Most-Favoured-Nation principle

A measure discriminating between like products imported from countries using differential environmental standards arguably could be inconsistent with MFN requirements of Article I.²² In practice, however, the GATT/WTO dispute settlement system has not yet provided a definite answer to whether the use of that measure was a violation of MFN.

In the 1991 *Tuna/Dolphin* dispute, Mexico did not challenge the US tuna imports ban by claiming a MFN violation.²³ Rather, it alleged a breach of Article I by US labelling provisions of the Dolphin Protection Consumer Information Act (DPCIA),²⁴ which allegedly discriminated against Mexico as a country fishing in the Eastern Tropical Pacific Ocean (ETP).²⁵ The panel noted that the DPCIA accords the right to use the label "Dolphin Safe" for tuna harvested in the ETP without using dolphin-harmful fishing techniques.²⁶ The panel finally dismissed Mexico's contention, given the acknowledgement that the labelling regulations applied to all countries whose vessels fished in this area and thus did not distinguish between products originating in Mexico and products from other countries.²⁷ The panel decision, nevertheless, cannot virtually exempt the US tuna embargo against a specified country, Mexico, from violating the MFN principle.²⁸

²¹ One assumes that those countries whose products using an environmentally sound method could take the following measures to avoid competitive disadvantage vis-à-vis other countries with relatively lower environmental standards. They include: (1) banning goods manufactured with an environmentally damaging process; (2) imposing an additional charge at the border equaling the difference in cost of production as result of the regulations; or (3) imposing a tax on all goods linked to the cost of regulation, with a rebate or subsidy for domestic producers. Those measures all may contravene the GATT basic principles. See Jackson, *World Trading System*, at 236.

²² See Jackson, *id.* at 236.

²³ Despite Mexico did not allege the violation of Article I by the tuna embargo, a third party, like Australia maintained that "the country-specific import prohibition in the Marine Mammal Protection Act discriminated between like tuna and tuna products in violation of Article I: 1; . . ." *Tuna I*, at para. 4.2.

²⁴ Pub.L. No. 101-627, 104 Stat. 4465 (codified at 16 U.S.C. 1385)

²⁵ *Id.* at para. 5.42.

²⁶ *Id.* at para. 5.43.

²⁷ *Id.*

²⁸ It is predicted that a future panel would simply limit this part of the decision to the use of restrictive product labelling. See McDonald, "Greening GATT", at 412.

In fact, the issue became a real controversy in the recent *Shrimp/Turtle* dispute. The complainants claimed that the US's import prohibition on shrimp and shrimp products from certain countries was inconsistent with the MFN principle because the physically identical shrimp and shrimp products from the targeted countries were treated differently with like products from other countries.²⁹ The US denied the violation of Article I, contending its measure applied equally to all harvesting Members.³⁰ Ultimately, the tribunal decided to avoid dealing with the issue simply because it considered that the finding on the violation of other provision by the US shrimp embargo made it unnecessary to spend the ink to review the claim.³¹

Unfortunately, the tribunal missed the chance to clarify the consistency of an imports ban against a like product whose production process causing environmental damage with the MFN obligation. Thus, the issue perhaps would continue to be debated.

(b) National treatment principle

Under Article III, discriminatory "internal measures," such as taxes, charges, laws or regulations cannot be implemented between domestic products and similar imported products. As countries tend to prohibit the importation of certain products produced by an environmentally harmful method, the question will be raised as to whether the national treatment norm applies to environmental measures. Strictly speaking, Article III is not literally relevant to the direct import ban simply because the measure targeting on imported goods would not be regarded as an internal measure.³² Nevertheless, the argument in the 1991 Tuna case offered a good chance to examine the applicability of Article III to the environmental imports ban.

In the *Tuna/Dolphin* dispute, the US argued that its tuna embargo constituted an enforcement at the time or point of importation of the regulations of the Marine Mammal Protection Act (MMPA) relating to the harvesting of tuna. Thus, the actions should be permitted by Article III: 4 and the Note Ad Article III.³³ The focal point the

²⁹ *Shrimp* panel, at para. 7.18.

³⁰ *Id.* at para. 7.21.

³¹ *Id.* at para. 7.22. The panel regarded its avoidance of addressing the claim was in conformity with the WTO/GATT practices among which a judgement in the *Wool Shirts* case mentioned that "A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." *Id.*

³² Charnovitz, "Pelly Amendment", at 776.

³³ *Tuna I*, at paras. 3.19; 5.8. The Note Ad Article III provides that:

Panel has to clarify is whether the tuna harvesting regulations aimed at reducing the incidental taking of dolphins would amount to an internal measure defined in those provisions. Examining the text of the national treatment obligation, the Panel found that Article III: 4 and the Note Ad Article III refer solely to internal measures that may *affect products* as such.³⁴ As a result, under the Note, the panel observed that an import ban on a product might be permissible if the action was aimed at enforcing "at the border an internal sales prohibition applied to both imported and like domestic products."³⁵ The Panel then noted that the MMPA regulations concerning only fishing technique "could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product."³⁶ Therefore, the Panel concluded that the US tuna embargo designed to enforce the MMPA requirements were not related to the GATT's national treatment provisions.³⁷

In the *Tuna II* case, the issue has been raised again. Likewise, the panel rejected that national treatment provisions were applicable to such measure, basing on the same reasoning as *Tuna I*.³⁸ Furthermore, the non-invocation of Article III as an applicable law in the recent *Shrimp/Turtle* dispute seems to signal that the inapplicability of Article III to the PPM imports ban has been widely accepted.

2 General Elimination of Quantitative Restrictions of Article XI

Apart from the non-discriminatory principles specified in Article I and III, Article XI institutes another primary rule of GATT. Subject to several narrow exceptions,³⁹ the provision outlaws imposition of prohibitions or restrictions other

Any . . . law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is . . . enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal . . . law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III. *See* GATT 1994, Annex.

³⁴ *Tuna I*, at para. 5.11.

³⁵ *Id.*

³⁶ *Id.* at para. 5.14

³⁷ *Id.* and para. 5.15. Mexico ever raised the complaint that the US MMPA requirements offered less favorable treatment to tuna products from Mexico than that accorded to like US tuna products, which violated GATT Article III. In line with its previous finding, the panel dismissed the claim. *See id.* para. 5.16.

³⁸ *Tuna II*, at paras. 5.8; 5.9.

³⁹ Article XI: 2 lists three types of exemption from the obligation of Article XI: 1. They include: (a) export restrictions to relieve critical shortages of foodstuffs and other products "essential" to the exporting contracting party; (b) import or export restrictions necessary to the application of standards for grading or classifying commodities; and (c) import restrictions on agricultural or fisheries products that are necessary to the enforcement of certain governmental policy measures.

than duties, taxes, or other charge on the importation, exportation or sale for export of any product.

In contrast to the non-discriminatory principles, Article XI appears to be the most relevant applicable law to the measure involving a direct import ban. The GATT/WTO tribunals have constantly delivered a clear and straightforward judgement regarding a violation of Article XI by the prohibition of imports of a product from countries not meeting certain environmental policy. In the *Tuna I* case, the panel found that the US's tuna embargo constituted a prohibition or restriction on the importation of tuna within the meaning of Article XX.⁴⁰ Like the *Tuna I* judgement, the *Tuna II* Panel stressed the embargoes were not "duties, taxes or other charges," thereby ruling that the US's imports ban was inconsistent with Article XI.⁴¹ Also, noting the previous tuna adjudication dealing with the similar issue, the panel, in the recent *Shrimp* case, therefore found that the US prohibition on imports of shrimp was in violation of Article XI.⁴² It should be noted that, in the above cases, the country taking the measure had not substantially disputed the allegation of such violation.⁴³

Given that none of the exceptions in Article XI would be relevant to environmental measure,⁴⁴ it may be therefore concluded that any invocation of an imports ban for environmental purposes would be generally deemed contrary to Article XI. The principle thus proves to be the most plausible law to prohibit such environmental trade measures.

B The implication of "General Exceptions" of Article XX to environmental protection

1 General observation

Notwithstanding the obligations of non-discrimination and other principles, WTO members are still permitted to implement trade restrictions inconsistent with those principles if specific requirements are met. The GATT sets up a provision entitled "General Exceptions" of Article XX as a basis of justifying those inconsistent

⁴⁰ *Tuna I*, at para. 5.18.

⁴¹ *Tuna II*, at para. 5.10.

⁴² *Shrimp* panel, at paras. 7.16, 7.17.

⁴³ See *Tuna I*, para. 5.18; In the *Shrimp* case, because the US did not dispute that its measure amounted to a restriction on the importation of shrimp, the panel regarded that such an admission of a particular fact entitled the tribunal to consider such fact as accurate. See *Shrimp* panel, at para. 7.15.

measures.⁴⁵ The legislation is an indication that legitimate national interests may supercede the trade liberalisation underpinned by several substantive rules.⁴⁶ In other words, the creation of Article XX represents the flexibility of the trade rule. It allows a contracting party to adopt trade measures against the mandate of the law under exceptional and specified circumstances.⁴⁷ In particular, the provisions provide some specific criteria allowing certain environmental trade measures to be justified, including:

- (b) necessary to protect human, animal or plant life or health;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

In addition, some general requirements are placed in "chapeau", stating:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustified discrimination* between countries where the same conditions prevail, or a *disguised restriction* on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

To have a better understanding of the operation and application of this provision, several aspects need to be clarified before starting to explore the implications of individual clause.

(a) Its interaction with other general rules of the GATT

Arguably, the applicability of this provision rests on the previous violations of the principles of the law. Hence there is no need to apply the article if it has been proved that no breach of the WTO/GATT's obligations occur.⁴⁸

It is inconsistent to simultaneously argue the consistency of a measure with general rules of the GATT law and justification of the measure under Article XX.

⁴⁴ See Canada--Measures Affecting Exports of Unprocessed Herring and Salmon, the Panel Report, 22 Mar. 1988, BISD/ 35S/ 98 [hereinafter *Herring and Salmon*].

⁴⁵ In addition to the introductory note, Article XX lists ten circumstances by which trade measures may be justified, covering the policies aimed to protect or promote public morals, environment, trade of gold or silver, customs enforcement, monopoly laws, banning prison products. See Article XX of GATT 1994, paragraph (a) to (j).

⁴⁶ The Appellate Body of the WTO, in the *Gasoline* case, stressed that "In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, . . ." See United States--Standards for Reformulated and Conventional Gasoline, Appellate Body Report, adopted on 20 May 1996, WT/DS2/AB/R [hereinafter *Gasoline App.*].

⁴⁷ *Id.*

⁴⁸ See McDonald, "Greening GATT", at 408.

But, it should be noted that, in reality, the acting party would find it difficult to predict whether the measure could be regarded as consistent with general principles or not. A defendant party, thus, should be allowed to place the invocation of Article XX as an alternative statement. In the 1991 *Tuna/Dolphin* case, the Panel states accordingly:

[a] party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting *ipso facto* an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such argument in the alternative be possible.⁴⁹

Moreover, although the exceptional clauses may be invoked to override the substantive obligations, there seems to be no inherent conflict between these two schools of trade law. In illuminating the relationship between Article XX (g) and GATT as a whole, in the *Gasoline* case, the Appellate Body remarks:

[A]rticle XX (g) and its phrase, . . . , need to be read in context and in such a manner as to give effect to the purposes and objects of the General Agreement. The context of Article XX (g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of Article I and III and XI includes Article XX. Accordingly, the phrase . . . may not be read so expansively as seriously to subvert the purpose and object of Article III: 4. Nor may Article III: 4 be given so broad a reach as effectively to emasculate Article XX (g) and the policies and interests it embodies.⁵⁰

In short, in terms of promoting the purposes and objects of the WTO/GATT mandate, they are considered to be mutually-supportive rather than mutually-destructive.

(b) Burden of proof

Article XX does not explicitly point out which party bears the burden of indicating that an exception applies. The rulings of the GATT panel have tended to place the burden upon the party seeking justification under the provision.⁵¹ As to a complaining party, it thus only needs to prove "a *prima facie* breach of GATT obligations to transfer the burden of justifying the measures to the party in breach."⁵²

⁴⁹ *Tuna I*, at para. 5.22.

⁵⁰ *Gasoline App.*, at 20.

⁵¹ Canada--Administration of the Foreign Investment Review Act, 7 Feb. 1984, BISD/ 30S/140, 164, at para. 5.20 [hereinafter *Investment*]; United States--Section 337 of the Tariff Act of 1930, 7 Nov. 1989, BISD/ 36S/345, 393, para. 5.27 [hereinafter *Section 337*]; see also *Tuna I*, at para. 5.22.

⁵² McDonald, "Greening GATT", at 418.

Recently, the WTO Appellate Body, in the *Wool Shirts* case,⁵³ has furthered the clarification of the issue by stating that "the burden of proof rests on the party, whether complaining or defending, which *asserts the affirmative of a particular claim or defence*."⁵⁴ If an exceptional clause of Article XX is virtually invoked to justify the use of certain trade measures, the action is considered to be in possession of the nature of affirmative defence.⁵⁵ Thus, "the burden of establishing such a defence should rest on the party asserting it."⁵⁶

(c) Strictness of interpretation of those exceptions

The question also arises as to what principle should govern the interpretation of Article XX. The exceptional circumstance of Article XX had been generally classified by the GATT Panel as "a *limited and conditional* exception from obligations under other provisions."⁵⁷ Thus, it has already become a long-term practice of the panels to interpret this provision narrowly.⁵⁸ The Panel, in the *Tuna I* case, further observed that the Article is "not a positive rule establishing obligations in itself. Therefore, the practice of panels has been to interpret Article XX *narrowly*, . . ."⁵⁹

The strictness of interpretation of Article XX virtually is in conformity with the doctrine of "Exceptio est strictissimae interpretationis." Because the exception may operate as to discard the application of the "principle" of the GATT, it must be subject to rigid interpretation. Otherwise, a broad approach is likely to run the risk of eliminating the possibility of applying the principle.⁶⁰

2 Interpretation and application of Article XX

(a) The relationship between chapeau and individual exceptions

The justification of a particular trade measure under Article XX, as shown above, has to meet the two sets of criteria. First is the chapeau. Second, the measure

⁵³ United States --Measures Affecting Imports of Woven Wool Shirts and Blouses from India, the Appellate Body Report, adopted on 23 May 1997, WT/DS33/AB/R [hereinafter *Wool App.*].

⁵⁴ *Id.* at 14.

⁵⁵ *Id.* at 16.

⁵⁶ *Id.* see also *Shrimp* Panel, at para. 7.14, 7.30; *Gasoline App.*, at 20.

⁵⁷ See Section 337, paras. 5.9 [emphasis added].

⁵⁸ *Tuna II*, at para. 5.26.

⁵⁹ *Tuna I*, at para. 5.22. See also *Investment*, at para. 5.20.

⁶⁰ Cheng, *Legal Maxim*, at 24.

must satisfy a number of specific exceptions embodied in the sub-paragraphs as well. They are parallel requirements.

It should be noted that, regardless of the order of examining these two sets of criteria, neither one needs to be further reviewed if the other one cannot be satisfied. In other words, the necessity to examine the subsequent element rests on the fulfillment of the previous category of requirement. For instance, in the *Gasoline* case, due to the WTO Panel's finding that the US's baseline establishment methods did not qualify the scope of a particular exceptional clause, Article XX (b), the Panel decided not to "proceed to examine whether it met also the conditions in the introductory clause to Article XX."⁶¹ Similarly, in 1998, as the WTO Panel concluded that the US's shrimp embargo could not be justified under the chapeau of Article XX,⁶² it found it unnecessary to examine whether the US measures could be covered by the terms of Article XX (b) or (g).⁶³

In the process of adjudicating whether the measure may be justified under the provision, it is pertinent to discuss which school of requirement should be examined first. Charnovitz seemed to favor the first reviewing of chapeau condition because "The provisions in the headnote can be viewed as gateway requirements to gain access to the exceptions in the Article XX subsections."⁶⁴ But, on the other hand, the WTO/GATT tribunals have not drawn a definite conclusion until the recent judgements.

Basically, the past practices indicated the inclination to first analyse the specific paragraphs of the Article before considering the chapeau's application to the measure under complaint.⁶⁵ In particular, the Appellate Body, in the *Gasoline* case, made a firm decision with respect to the order of applying the Article XX by declaring that:

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions--paragraphs (a) to (j)--listed under Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX (g); second further appraisal of the same measure under the introductory clauses of Article XX.*⁶⁶

⁶¹ *Gasoline* Panel, at para. 6.29.

⁶² *Shrimp* Panel, at para. 7.62.

⁶³ *Id.* at para. 7.63.

⁶⁴ Charnovitz, "Pelly Amendment", at 778.

⁶⁵ *Shrimp* Panel, at para. 7.28.

⁶⁶ *Gasoline* App., at 20 [emphasis added].

It is probably the first express disclosure of the WTO/GATT's position on "the sequence of steps"⁶⁷ for examining elements contained in Article XX. Regrettably, no reason has been formulated in support of this arrangement.

Nevertheless, such method of applying Article XX has not yet prevented the subsequent WTO decision from taking a differential approach. The Panel report on the US's shrimp import ban represented a novel but subversive view on this issue. Even noting that the past practices have used to consider the particular exceptions before the chapeau,⁶⁸ the Panel seemed confident on that the practice has not become a fixed rule. The Panel thus contemplated that it was discretionary for the dispute settlement body to decide which criterion should be reviewed first. No wonder, the Appellate Body, reviewing the panel report, found that "The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference."⁶⁹

In particular, the Panel pointed out that "[a]s the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, *it seems equally appropriate to analyse first the introductory provision of Article XX.*"⁷⁰ As a result, the Panel decided to examine first whether the measures at issue satisfies the conditions contained in the chapeau on the ground that "the chapeau determines to a large extent the context of the specific exceptions contained in the paragraphs of Article XX."⁷¹

Yet, the Panel's approach did not eventually win the approval of the Appellate Body. In reviewing the findings of the Panel, the Appellate Body took a stand contrary to that of the Panel and ruled that the interpretative analysis adopted by the Panel "constitute error in legal interpretation and accordingly reverse them."⁷² More importantly, it held that the sequence of steps specified in the *Gasoline* case is a right and mandatory method of applying Article XX rather than a discretionary method.

To uphold the position, in the beginning, the Appellate Body made efforts to defend the imperative of applying the "sequence of steps" presented in the *Gasoline* case by solemnly declaring that the method "reflects, not inadvertence or random

⁶⁷ The term seemed first used by the Appellate Body in the *Shrimp* case. See *Shrimp App.*, at para. 117.

⁶⁸ *Shrimp Panel*, at para. 7.28.

⁶⁹ *Shrimp App.*, at para. 119.

⁷⁰ *Shrimp Panel*, at para. 7.28[emphasis added].

⁷¹ *Id.* para. 7.29.

⁷² *Shrimp App.*, at para. 122.

choice, but rather the fundamental structure and logic of Article XX."⁷³

Moreover, the dispute settlement body enunciated the reasons why rules governing the interpretation of Article XX demand that the chapeau conditions not be examined ahead of the terms of the specific exceptions. Basically, the Appellate Body's analysis rested on two arguments.

First, it considered that the nature of the chapeau makes it difficult to carry out a direct interpretation of it without first examining the specific conditions in the subparagraphs of Article XX.⁷⁴ Clearly, unlike those exceptional clauses serving particular national interests, the chapeau language is abstract. Hence, the Appellate Body regards that "The standards established in the chapeau are, moreover, necessarily broad in scope and reach . . ." The application of the chapeau accordingly shall function differently and thus possess distinct implications pending on the invocation of various exceptions. The Appellate Body correctly observed that:

When applied in a particular case, *the actual contours and contents of these standards will vary as the kind of measure under examination varies*. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. *The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.*⁷⁵

In the light of the above analysis, in order to have a more accurate application of the chapeau, it appears an essential step to determine first the provisional justification of a measure under a particular exception. Then, the chapeau should be considered subsequently.

Secondly, the Appellate Body highlighted the undesirable consequence caused by the Panel's interpretative approach in an attempt to prove the existence of the flaw and inappropriateness embodied in the Panel's method. As indicated, the abstract concept of the chapeau is highly likely to be subject to a random interpretation unless it is confined to a certain ambit of a particular exceptional provision. The Appellate Body thus found that the Panel's approach tends to be at the risk of overly broadening the scope of the chapeau conditions. In reality, the Panel in the *Shrimp/Turtle* dispute

⁷³ *Id.* at para. 119.

⁷⁴ *Id.* at para. 120.

⁷⁵ *Id.*

did formulate an extensive standard and a test that all are beyond "either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States."⁷⁶ As a result, the Panel found the US's measure illegal under the chapeau conditions on the ground that it "conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States." However, as the Appellate Body maintained, such character embodied in any trade measure "may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX."⁷⁷ The Appellate Body therefore concluded that the broad interpretation of the chapeau elements "renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."⁷⁸

To summarise, the Appellate Body in the *Shrimp* case had an in-depth elaboration over the method of the "sequence of steps" established in the *Gasoline* case. The tribunal articulated convincing grounds aimed at rejecting the liberal approach adopted by the Panel. As Atik observes, "The 'chapeau later' approach . . . squares nicely with the 'eminent domain' reading of Shrimp-Turtle."⁷⁹ Arguably, the model set by the Appellate Body will make it difficult for the subsequent dispute settlement organ to resort to a different approach, such as the one favoured by the Panel in the *Shrimp* case.

(b) Common issues with respect to the application of environmental exceptions in Article XX--limitation on the geographic application of Article (b) and (g)

As indicated above, there are two primary items related to environmental concern listed in the exceptional clauses of Article XX, namely sub-paragraphs (b) and (g).⁸⁰ Before analysing the requirements embodied in respective clause, a common prerequisite underlying both exceptions should be addressed. In short, it is essential to explore the geographic scope of applying those provisions due to the fact

⁷⁶ *Id.* at para. 121.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Atik, "Shrimp-Turtle", at 11.

⁸⁰ In terms of treaty language, none of these exceptional clauses literally refer to "environment" mainly because the GATT rules was drafted in 1940s when environmental protection has not seriously attracted world wide attention.

that the recent use of environmental trade measures, like tuna or shrimp embargo, was aimed at national conduct beyond the territory of the implementing country.

Indeed, it is difficult to decide the geographic range of paragraph (b) and (g) simply by reading the texts of them. Hence, there has long been an intense debate over whether the objects of alleged "human, animal or plant life or health" and "exhaustible natural resources" the two clauses set to protect and conserve should be interpreted to cover the environmental concern beyond national border, or to only protect national interests. The GATT/WTO has enunciated differing approaches in the recent decade, featuring either a strict or a broad interpretation.

(i) *Strict interpretation*

In the 1991 tuna/dolphin dispute, the US contended that Article XX (b) or (g) may justify its tuna embargo against Mexico whose tuna harvest process was considered dolphin harmful, even if these measures were inconsistent with the GATT basic principles.⁸¹ By contrast, on the basis of the letter and spirit of Article XX, Mexico argued that those provisions are only designed to protect environmental interests *within the territory* of the party taking measures.⁸² Otherwise, it maintained that, if the US's claim were justified, such broad interpretation "would have the consequence of introducing the concept of *extraterritoriality* into the GATT, which would be extremely dangerous for all contracting party."⁸³ As a result, as Mexico worried, "one contracting party could arrogate to itself the right to protect the life or health of humans and animals in international areas or within the territory of other contracting parties."⁸⁴

In response, citing international wildlife agreements, like the Convention on International Trade in Endangered Species (CITES) that obliges a party to use trade measures to protect species outside the jurisdiction of that party, the US defended the justification of the imports ban aimed at pursuing environmental protection beyond its jurisdiction.⁸⁵ Further, it argued that GATT provisions actually did not specify the limitation regarding the location of those environmental objects.⁸⁶ Besides, the US highlighted the nature of trade measures, which more or less produced effects outside

⁸¹ *Tuna I*, at para. 3.6.

⁸² *Id.* at paras. 3.31, 3.35 and 3.48[emphasis added].

⁸³ *Id.* at para. 3.31. *See also* para. 3.48.

⁸⁴ *Id.* at para. 3.35.

⁸⁵ *Id.* at para. 3.36.

the territory of a contracting party. Overall, it argued that the trade embargo was not an extraterritorial application of the US's legislation, but "simply specified the products that could be marketed in the territory of the United States."⁸⁷

On this critical issue, the Panel admitted that no clear answer could be found merely by reading the text of these clauses concerning the geographic range of applying the environmental exceptions.⁸⁸ The Panel, therefore, decided to clarify the implication of the treaty by the following criteria: the drafting history of the article, its purpose, and the consequences resulted from applying the interpretations proposed by the parties.

Relying on the preparatory work of drafting Article XX (b),⁸⁹ the Panel observed that the provision was originally to contain the proviso: "if corresponding domestic safeguards under similar conditions exist in the importing country." Though this arrangement was considered unnecessary and thus dropped eventually, the record, the Panel concluded, "indicates that the concerns of the drafters of Article XX (b) focused on the use of *sanitary measures* to safeguard life or health of humans, animals or plants *within the jurisdiction of the importing country*."⁹⁰

The Panel further recalled the finding of a previous panel that the exceptions in Article XX are designed to "allow parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable."⁹¹ It seemed to the Panel that the policy of using trade measures for extraterritorial environmental concern was not unavoidable. More important, it proclaimed the undesirable consequence of adopting the US's broad interpretation of Article XX (b), which would allow each party to dictate "the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement." Hence the US approach, the Panel worried, would be detrimental to the multilateral framework of the Agreement, and "provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations."⁹²

⁸⁶ *Id.* at para. 3.42.

⁸⁷ *Id.* at para. 3.49.

⁸⁸ *Id.* at para. 5.25.

⁸⁹ The inclusion of Article XX (b) was proposed by the US and the UK, which was embodied in the Draft Charter of the International Trade Organization (ITO). See Charnovitz, "Environmental Exceptions", at 43-45.

⁹⁰ *Tuna I*, at para. 5.26 [emphasis added].

⁹¹ *Id.* at para. 5.27.

⁹² *Id.*

As to sub-paragraph (g) of Article XX, invoking the identical reasoning as it had used in Article XX (b), the Panel mainly spelt out the unacceptable result of applying the exception extensively.⁹³ The Panel thus was in favour of limiting alleged "exhaustible natural resources" to those situated in the territory of the party taking the measures.

Not surprisingly, the resistance of the Panel to justify trade measures which were imposed for global or transboundary environmental purposes aroused severe criticism. The drafting history, critics argued, did not prevent parties from protecting global commons by implementing trade restrictions.⁹⁴ Rather, after a thorough examination of the preparatory work of the Agreement, Charnovitz observed that nations are permitted to take trade measures for extraterritorial environmental concern.⁹⁵ Additionally, the Panel ruling was also deemed unsympathetic to the increasing importance of global environmental treaties that utilise a trade tool to fulfill their goals.⁹⁶

It is admitted that the reading of historical documents is likely to lead to a differing interpretation on sub-paragraph (b) and (g) of Article XX, notwithstanding by narrow or broad view. The Panel's comprehension of the draft history may be not entirely accurate.⁹⁷ Yet, as Jackson points out that citing preparatory work simply is an ancillary means of interpreting treaties.⁹⁸ He thus urges the shift of focus on several decades of practice since the creation of GATT, which has been in favor of limited application of those exceptions to national environmental concern.⁹⁹ More important, he arguably acknowledged the potential risk, as the Panel indicated above, of applying the exceptions abroad. In short, the extraterritorial application of Article XX (b) and (g), he concluded, would create the consequence of a "slippery slope"¹⁰⁰ that could undermine the multilateral trading system.

To sum up, the *Tuna* decision shown the tendency of the Panel's rejection of trade measures aimed at advancing the environment outside the jurisdiction of a

⁹³ *Id.* at para. 5.32.

⁹⁴ Dunoff, "Prosper and Protect", at 1416-17.

⁹⁵ Charnovitz, "Environmental Exceptions", at 37.

⁹⁶ MacDonald, "Greening GATT", at 432-33. Those environmental treaties mainly include: Montreal Protocol on Substances That Deplete the Ozone Layer, Basel Convention on Transboundary Movements of Hazardous Waste and Convention on International Trade in Endangered Species of Flora and Fauna.

⁹⁷ See Christensen, "Environmental Regulation", at 583-85.

⁹⁸ Jackson, "Congruence or Conflict", at 1241.

⁹⁹ *Id.* at 1238-39, 1241-42.

¹⁰⁰ *Id.* at 1242.

implementing party, even though other exceptional clauses, like measures related to prison products,¹⁰¹ do have extraterritorial effect. In addition, the ruling reflected that the Panel virtually abided by the principle requiring the rigid interpretation of exceptional provisions.¹⁰² Nevertheless, it remained unclear whether subsequent tribunals would invoke the *Tuna* judgement partly because the GATT did not adopt the Panel report.¹⁰³

(ii) *Broad interpretation*

a. The second *Tuna/Dolphin* dispute

In 1994, the GATT Panel considered another tuna/dolphin case brought by European Economic Community (EEC) and the Netherlands, which were under intermediary embargo launched by the US. The issue of geographic limitation with respect to the exceptional clauses of Article (b) and (g) remained a moot point. The US still insisted that both paragraphs have not set a requirement for the resources or living things, like dolphins, to be within the territorial jurisdiction of the country taking the measures.¹⁰⁴ The EEC and the Netherlands held the opposite opinion.¹⁰⁵

In contrast to the narrow view adopted by the *Tuna I* Panel, the *Tuna II* Panel arrived at a relatively broader conclusion by considering factors somewhat different from those of the former. But, it should be born in mind, strictly speaking, the Panel, unlike the *Tuna I* judgement, considered sub-paragraph (b) and sub-paragraph (g) on different legal grounds.

(1) Article XX (g)

As to natural resources, at first, the Panel, concurring with the *Tuna I*, recognised that no explicit limitation on the location of the exhaustible natural resources to be conserved has been specified.¹⁰⁶ The Panel then noted that two previous panels have considered migratory species of fish were covered by Article (g), irrespective of being

¹⁰¹ See Article XX (e) of GATT 1994.

¹⁰² See above discussion.

¹⁰³ The unadopted panel report thus had no direct legal effect. See Kingsbury, "Tuna-Dolphin Controversy", at 1. However, the legal opinion of the report, even not adopted, has still been cited by the latter judgement. See *Shrimp* Panel, at para. 7.46.

¹⁰⁴ *Tuna II*, at para. 5.11.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at para. 5.15.

caught within or outside the territorial jurisdiction of the party taking the measure.¹⁰⁷ In order to prove extraterritorial application has not entirely been excluded in Article XX, the Panel further pointed that measures may be permissible concerning things located, or actions occurring, outside the border of parties, such as Article XX (e) relating to products of prison labour.¹⁰⁸

A number of environmental and trade treaties were presented by either party to sustain their arguments. Examining the rules of interpretation embodied in the Vienna Convention on the Law of Treaties,¹⁰⁹ the Panel denied the relevance of those treaties to the interpretation of those exceptional clauses.¹¹⁰ The Convention specifies that those agreements to be considered in support of the interpretation of a treaty must be concluded after the latter and have connection with it. The Panel found that either they were created prior to the GATT or that "no direct references were made to these treaties in the text of the General Agreement."

Moreover, unlike the Panel Report in the *Tuna I* case, the Panel obviously lessened the significance of utilising drafting history in facilitating the interpretation of Article XX (g). It correctly observed that such materials were unable to provide reliable and clear evidences on which either contention of the parties over the issue of the location of the natural resources could be based.¹¹¹

The Panel finally concluded that "no valid reason supporting the conclusion that the provisions of Article XX (g) apply only to polices related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision."¹¹² In effect, in terms of Article XX (g), geographic limitation was found baseless in this Panel report. But, on the other hand, unfortunately, apart from citing the previous panel's decisions, it failed to elaborate the substantial reasons to sustain its argument.

Admittedly, in contrast to the *Tuna I* case, the approach employed by the Panel in the interpretation of Article XX (g) represents an improvement, which no longer relied on the drafting history as a crucial reference. Clearly, it dropped the linkage of such an extensive approach to the risk of "slippery slope" raised in the *Tuna I* dispute.

¹⁰⁷ *Id.* see also *Herring and Salmon*; United States--Prohibition of imports of tuna and tuna products from Canada, the Panel Report, adopted 22 February 1982, 29S/91 [hereinafter *Canada Tuna*].

¹⁰⁸ *Tuna II*, at para. 5.16.

¹⁰⁹ Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27 (1969), 1155 UNTS 336, signed at Vienna 23 May 1969, entered into force 27 January 1980.

¹¹⁰ *Tuna II*, at paras. 5.19, 5.20.

¹¹¹ *Id.* at para. 5.20.

Further, it seemed to allocate the task of preventing such risk to other conditions provided in same article.¹¹³

(2) Article XX (b)

Basically, the Panel followed the same reasoning used in interpreting Article XX (g) in dealing with the location of the living thing to be protected under Article XX (b).¹¹⁴ But, it did not mention whether previous panels have approved the use of trade measures aimed to address the protection of living things outside the territory of the party taking the measure. In fact, it has been observed that no practices of the GATT system have ever endorsed such extensive interpretation over sub-paragraph (b).¹¹⁵

Ultimately, the Panel seemed hesitant to make a firm judgement on the "precise scope of the policy area"¹¹⁶ for Article XX (b) as its ruling for Article XX (g). It simply saw that there was no need to assess "whether the intent of the drafters was to restrict measures justifiable under Article XX to sanitary measures."¹¹⁷ It is therefore not clear whether the requirement of geographic limitation should be imposed on Article XX (b).¹¹⁸

b. *Shrimp/Turtle dispute*

Again, the US's shrimp imports ban against some Asian countries aimed at the conservation of sea turtles aroused the same issue regarding the extraterritorial application of environmental measures. The WTO tribunals, mainly the Appellate Body, adopted a new method to assess if sea turtles, even located outside the territorial jurisdiction of the party taking the measures, may still be covered by Article XX (g). In contrast to the two *Tuna* cases, the Appellate Body avoided directly determining whether any geographic limitation has been imposed on the exception. Rather, it stated: "We do not pass upon the question of whether there is an implied *jurisdictional limitation* in Article XX (g), and if so, the nature or extent that

¹¹² *Id.*

¹¹³ Article XX (g) of GATT 1994 spells out several elements to be satisfied. See the discussion below.

¹¹⁴ *Tuna II*, at paras. 5.31 to 5.33.

¹¹⁵ See Jackson, "Congruence or Conflict", at 1240-41.

¹¹⁶ See *Tuna II*, at para. 5.31.

¹¹⁷ *Tuna II*, at para. 5.33.

¹¹⁸ Cf. One commentator took an extensive view on the *Tuna II* Panel report, holding that the Panel has accepted that these exceptions could apply no matter where the plants, animals were located. See Kingsbury, "Tuna-Dolphin Controversy", at 20, n. 47.

limitation."¹¹⁹ In effect, the tribunal focused on the examination of particular situations regarding the sea turtles case. It noted that the highly migratory and transboundary nature of sea turtles "passing in and out of waters subject to the rights of jurisdiction of various coastal states and high seas."¹²⁰ Further, the Appellate Body recognised that the US did exercise jurisdiction over the waters where sea turtles occur. Given the observation of the above two critical elements, it found that " We note only that in the specific circumstances of the case before us, there is a *sufficient nexus* between the migratory and endangered marine populations involved and the United States for purposes of Article XX (g)."¹²¹ Hence, in light of the finding, the US measures imposed for protecting sea turtles met the condition of the "conservation of natural resources" under Article XX (g).

The ruling, surely, would provide some relief to those who support the use of trade measures by parties for global environmental protection.¹²² In response to the ruling of the Appellate Body, the US responded that: " . . . [t]he Appellate Body made a number of important and positive findings that help clarify the critical relationship between WTO rules and measures taken to protect the environment."¹²³ Indeed, the decision has officially opened up a gate for the extraterritorial application of environmental measures under the WTO legal regime. Encouraged by the ruling, Perkins contends, "[a] WTO Member may rely on Article XX (g) to justify a trade-restrictive measure aimed at protecting environmental resources in the *global commons* so long as there is at least some *jurisdictional relationship between those resource and that WTO Member*."¹²⁴ The statement, however, seems to be a premature conclusion partly because the Appellate Body has already required a "sufficient nexus" between the party taking the measure and the natural resources to be conserved in order to ensure the fulfillment of the aim of Article XX (g). In a sense, the application of the standard will vary pending on the distinct circumstances surrounding the implementation of certain environmental trade measures. As the

¹¹⁹ *Shrimp App.*, at para. 133[emphasis added].

¹²⁰ *Id.*

¹²¹ *Id.*[emphasis added].

¹²² Perkins, "Shrimp Prohibition", at 119. See also Dunoff, "Border Patrol", at 25.

¹²³ See Statement of Ambassador Rita Derrick Hayes, Permanent U.S. Trade Representative to the World Trade Organization to the WTO Dispute Settlement Body (Nov. 25, 1998).

¹²⁴ Perkins, "Shrimp Prohibition", at 119.

content of the global commons has become increasingly diverse,¹²⁵ it is quite impossible that the WTO would simply allow the measures designed to preserve such resources to be justified without carefully taking into account respective circumstances affecting its judgement. The WTO tribunals accordingly are highly likely to generate differential implications about the condition of a "sufficient nexus" whenever a similar dispute arises. Qureshi correctly observed that: "By stipulating the need for a nexus between the State and the object of environmental concern, the possibility of extraterritorial application of environmental measures is opened up, as well as *limited*."¹²⁶ The author notes that the tribunal did not define expressly the term of a sufficient nexus. However, he seems to agree that the new formula presented by the Appellate Body has struck a balance between members wishing to invoke one of the exceptions and the fundamental rights under GATT 1994. He further adds that "The balance to be struck is determined by the notion of sustainable development, and depends on the measure at stake and the particular circumstances of the case."¹²⁷

In conclusion, the WTO ruling that to some extent demonstrated its tolerance toward certain trade restrictions imposed to achieve environmental protection outside the border of the acting party contains several significant messages. First, in contrast to the two *Tuna* panel reports considering the similar issue, it was the first case dealt by the newly created WTO Dispute Settlement Body regarding the extraterritorial environmental measures, whose reasoning definitely will have certain influence over the future dispute. Second, the issue of whether there is a general limitation on the location of the environmental objects in Article XX (b) or (g) perhaps would be dismissed consequently. In other words, geographic borders probably would cease to be a main focus.¹²⁸ Instead, predictably, the WTO tribunals would focus on the facts surrounding the imposition of the measure in order to decide if such objects fall into the scope of Article XX (b) or (g).¹²⁹ The new approach may enable the tribunals to maintain flexibility in searching for the alleged "nexus" on the case by case basis. Third, the possibility of provisionally justifying the measure to protect extraterritorial environment makes the relatively narrow approach taken in the *Tuna I* case, which

¹²⁵ The global commons generally refer to the common areas of international community without being subject to certain jurisdiction, covering the high seas, ozone layer, global climate, and the Antarctic. See Birnie and Boyle, *International Law and the Environment*, at 154.; Sands, *Principles*, at 16.

¹²⁶ Qureshi, "Extraterritorial Shrimps", at 204[emphasis added].

¹²⁷ *Id.*

¹²⁸ Dunoff, "Border Patrol", at 25.

¹²⁹ See Mann, "Revolution and Result", at 31.

literally restricts Article XX (g) to national environmental protection, obsolete. Finally, since neither the Panel nor the Appellate Body addressed the legality of the shrimp embargo under Article XX (b)--the protection of living things,¹³⁰ it remains to be seen whether the new approach established for Article XX (g) may also apply to paragraph (b). Nonetheless, due to the close nature of both exceptions, it is highly likely that the tribunals will adopt the same reasoning to decide the policy area of Article XX (b).

(c) Protection of living things in Article XX (b)

The environmental exception clause of Article XX (b) permits a party to adopt measures inconsistent with the treaty's obligations to serve the policy goal of protecting human, animal or plant life or health. But the measure must meet the test of "necessity", which also apply to other categories, like sub-paragraph (a) and (d). The requirement, as the Appellate Body in the *Gasoline* case observed, underlines the specified "degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized."¹³¹

Several rulings of the GATT/WTO tribunals have contributed to the clarification of alleged "measures necessary," using a relatively narrow method of interpretation. In the *Section 337* case, the Panel interpreted the term "necessary" in the context of Article XX (d), stating that:

[a] contracting party cannot justify a measure inconsistent with another GATT provisions as "necessary" in terms of Article XX (d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures *reasonably available* to it, that which entails the *least degree of inconsistency* with other GATT

¹³⁰ Since the US measure was regarded by the Panel inconsistent with the requirements in the chapeau of Article XX, the organ found it unnecessary to examine whether the US measure is covered by the exceptional clauses. See *Shrimp* Panel, at paras. 7.63, 7.29. Article XX (b) had no opportunity to be examined by the Appellate Body because as it stated that "... the United States invokes Article XX (b) only if and to the extent that we hold that Section 609 falls outside the scope of Article XX (g). Having found that Section 609 does come within the terms of Article XX (g), the Appellate Body, therefore, considered it unnecessary to analyse whether the measure met the requirement of Article XX (b)." *Shrimp App.*, at para. 146.

¹³¹ *Gasoline App.*, at 16. Apart from "necessity" requirement, Article XX uses other different terms to depict such connection or relationship for various categories of exceptional clauses. For instance, "relating to" was set up in paragraphs (c), (e) and (g); "in pursuance of" in paragraph (h); "essential" in paragraph (j); "for the protection of" in paragraph (f); and "involving" in paragraph (i).

provisions.¹³²

Further, the Panel in the *Thai Cigarette* case found that the reasoning in the above case could be largely applicable in examining a measure under Article XX (b) when Thailand argued that its ban on the imports of cigarette was necessary to protect health of its nationals. The panel considered that:

The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX (b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.¹³³

In the light of these WTO/GATT rulings, the party invoking Article XX (b) in justification of its inconsistent measures is required to demonstrate that no other alternative consistent or less inconsistent measures are reasonably available to it.

The least-trade-restrictive or least degree of inconsistency approach established in the previous practices apparently remained decisive in determining the consistency of trade measures addressing extraterritorial environmental problems with Article XX (b). In the *Tuna I* case, the Panel concluded that the US's tuna imports ban aimed at protecting dolphins life was not necessary mainly because the latter had not "exhausted all options reasonably available to it to pursue its dolphin protection objectives."¹³⁴ The other available options with least inconsistency with the GATT rules, the Panel assumed, include "[i]n particular through the negotiation of international cooperative arrangement, . . ."¹³⁵ Moreover, the Panel extraordinarily added a further implication on the requirement of necessity by incorporating the factor of "predictability." Because the US imposed onto exporting state its own standard of incidental dolphin taking rate which the latter cannot predict, the Panel considered that the US's tuna ban could not meet the terms of Article XX (b).¹³⁶

In the *Tuna II* case, apart from affirming the less restrictive standard,¹³⁷ the Panel sought to confine the category of "measures necessary" as ones that may not lead to

¹³² Section 337, at para. 5.26.

¹³³ Thailand--Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, BISD 37S/200, at para. 75.

¹³⁴ *Tuna I*, at para. 5.28.

¹³⁵ *Id.* It has been argued that the US's long term efforts of attaining such international arrangement was ignored by the Panel. See Charnovitz, "Pelly Amendment", at 784.

¹³⁶ *Tuna I*, at para. 5.28.

¹³⁷ *Tuna II*, at para. 5.35.

the impairment of the basic objectives and principles of the GATT. The aim of both the primary and intermediary nation embargoes on tuna, the Panel observed, is to "force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the protection of the life or health of dolphins."¹³⁸ As a result, the coercive nature of the US's embargo, the Panel considered, would seriously undermine the objectives of the General Agreement.¹³⁹ Therefore, the Panel ruled that such measures could not be considered "necessary" for the protection of dolphin in the sense of article XX (b).¹⁴⁰

The interpretative method adopted by those panel reports regarding the necessity test reflects the consistently narrower view on the exceptional provisions in this trade regime. Not surprisingly, this approach provokes serious criticism. Generally, it has been observed that this rigid interpretation places too much constraint on national freedom to fulfil environmental policy.¹⁴¹ By applying the approach, most use of environmental trade measures would not be considered as necessary mainly because, theoretically, other less-GATT-inconsistent alternatives shall be always conceivable.¹⁴² Additionally, the restrictive application of Article XX (b) was considered unable to adequately accommodate certain emergent environmental mishap, which may "justify the immediate imposition of trade restrictions."¹⁴³ On the other hand, two *Tuna* panel reports linking the predictability to the necessity requirement and assigning the provision the duty of preserving the mandates of the trade regime both seem to load excessive and unnecessary burdens upon Article XX (b).¹⁴⁴

It is uncertain whether the new WTO system would be more willing to ease the strictness regarding the interpretation of Article XX (b) so as to adopt a flexible method. Yet the WTO's ruling on the *Gasoline* case was an indication of its

¹³⁸ *Id.* at para.5.37.

¹³⁹ *Id.* at para. 5.38.

¹⁴⁰ *Id.* at para. 5.39.

¹⁴¹ See generally Schoenbaum, "Trade and Environment", at 276-77. Mann, "Revolution and Result", at 29. Schoenbaum argued that the threshold required to satisfy the exception in Article XX (b) needs to be lowered, which may ensure parties some freedom of action. Meanwhile, the WTO is still entitled to intervene by adequately applying the chapeau. The WTO's approach taken in the *Gasoline* case, he claimed, provided a good example. *Id.* at 277.

¹⁴² Esty, *Greening GATT*, at 48-9. See also Charnovitz, "Pelly Amendment", at 784.

¹⁴³ McDonald, "Greening GATT", at 435-6.

¹⁴⁴ One writer criticises that "it is difficult to follow the panel's logic in concluding that the lack of predictability went to the necessity of the provision itself." See McDonald, *id.* at 437.

continuous embracing of the less trade restrictive interpretation to a large extent.¹⁴⁵ As to trade measures used for the further protection of global environmental concern, it is hard to predict whether the model of the *Tuna cases* on the interpretation of necessity requirement will continue to influence the subsequent dispute. Regrettably, Article XX (b) had no chance to be examined in the recent *Shrimp/Turtle* case. Nevertheless, two factors perhaps may affect the future WTO evaluation on the requirement. First, the WTO's *Shrimp* decision, particularly on Article XX (g), has suggested that a flexible attitude toward the interpretation of environmental exceptions has been increasingly accepted. As a result, as Schoenbaum observes, The WTO is likely to interpret the necessity test as "reasonably available and political achievable under the particular circumstances rather than as necessary in an absolute sense."¹⁴⁶ Second, by contrast, the tribunals may still stick to the restrictive approach simply because, unlike the protection of national interests of living things, the interests of extraterritorial environment are indirect and thus "measures necessary" for that purpose should be subject to more rigid restriction.

(d) Conservation of natural resources in Article XX (g)

Under Article XX (g), the WTO members are allowed to take measures inconsistent with GATT norms to conserve exhaustible natural resources. In contrast to Article XX (b) only requiring the unique "necessity" test, the GATT drafters apparently spell out more sophisticated conditions for the fulfillment of the environmental exception.

(i) Relationship between the measure being invoked and the policy of conserving exhaustible natural resources

Unlike the rigid "necessary" test in Article XX (b), paragraph (g) specifies "relating to" to underline the linkage between the measure and the conservation objectives sought to be performed. Recognising the difference between the condition of "necessary" and "relating to", the *Herring and Salmon* panel classified the phrase by ruling:

The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be *primarily aimed at*

¹⁴⁵ See *Gasoline Panel*, at paras. 6.24-28. Since the US did not appeal the panel's ruling regarding Article XX (b), the Appellate Body decided to avoid judging the issue.

the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX: (g).¹⁴⁷

Clearly, this interpretation of "relating to" as "primarily aimed at" has been constantly relied on by subsequent panel reports.¹⁴⁸ The questions, however, would be raised as to what constitutes a measure "primarily aimed at." The practices demonstrate that various implications have been revealed on this term.

In the *Tuna* cases, to certain extent, the Panels appear to follow their reasoning regarding the "necessary" test in Article XX (b) in deciding whether those measures met the "primarily aimed at" test specified in paragraph (g). They denied that the US trade measures were primarily aimed at conservation of dolphins on the ground that either the standards to assess the US's tuna market lacked predictability¹⁴⁹ or the coercive nature of the embargo departing from achieving the legitimate conservation policy.¹⁵⁰ It is dubious that such awkward approach would influence the following similar decisions. It has been assessed that the panels failed to interpret the element adequately simply because it did not entirely focus on the trade restrictions itself but on the specific circumstances surrounding the import ban.¹⁵¹

In the WTO period, basically, the "primarily aimed at" test has not been fundamentally challenged but nonetheless has been modified considerably. In the *Gasoline* case, the Appellate Body first confirmed the well-accepted concept that "a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to fall within the scope of Article XX (g)."¹⁵² Meanwhile, it expressed a sort of dissatisfaction for the term used to define treaty language of "relating to" by stating that "the phrase "primarily aimed at" is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX (g)."¹⁵³ Further, the tribunal particularly highlighted the existence of "substantial relationship" between the US measure under appraisal and the

¹⁴⁶ Schoenbaum, "Shrimp-Turtle", at 38.

¹⁴⁷ *Herring and Salmon*, at para. 4.6.

¹⁴⁸ See *Tuna I*, at para. 5.33; *Tuna II*, at para. 5.22; United States--Taxes on Automobiles, DS31/R (1994), unadopted [hereafter *Automobiles*]; *Gasoline Panel*, at para. 6.39 and; *Shrimp App.*, at para. 136.

¹⁴⁹ See *Tuna I*, at para. 5.33.

¹⁵⁰ See *Tuna II*, at para. 5.27.

¹⁵¹ McDonald, "Greening GATT", at 446.

¹⁵² *Gasoline App.*, at 19.

conservation policy that the measure was taken to reach to prove that the measure was aimed at the conservation of clean air for the purpose of Article XX (g).¹⁵⁴

Moreover, instead of employing the test "primarily aimed at," the *Shrimp/Turtle* Appellate Body shifted its focus to the elaboration of "substantial relationship" test proposed in the *Gasoline* case. It straightforwardly defined the alleged substantial relationship between the measure and the conservation objectives as "a close and genuine relationship of ends and means." By using this standard, it proceeded to determine whether the US law authorising the imports ban on shrimp, namely Section 609, was a measure "relating to" the conservation of sea turtles.

There were two types of certification under Section 609 through which countries are permitted to export shrimp to the US. One demands that a country must have a turtle-friendly fishing environment in the course of commercial shrimp trawl harvesting.¹⁵⁵ The second type requires an exporting country to adopt, essentially, a regulatory program requiring the use of Turtles Escape Devices (TEDs) by shrimp trawling vessels.¹⁵⁶ In particular, the latter's requirement was measured by the tribunal as a *direct connection* with the conservation objective due to the well-recognised effectiveness of TEDs for the preservation of sea turtles.¹⁵⁷ Further, the Appellate Body, applying the principle of proportionality, maintained that the design of the measure embodied in the US Section 609 generally "is *not disproportionately* wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species."¹⁵⁸ Overall, the tribunal decided:

The means are, in principle, *reasonably* related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a *close and real* one, a relationship that is every bit as *substantial* as that which we found in United States- *Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.¹⁵⁹

In the light of the above observation, it is clear that the WTO system has made

¹⁵³ *Id.* One commentator even regarded that the "primarily aimed at" and "relating to" are not synonymous, and the former test "seems to be an unwarranted amendment of Article XX by the GATT *Herring and Salmon* panel." See Schoenbaum, "Reconciling trade and Environment", at 278.

¹⁵⁴ The Appellate Body stated that "[g]iven that substantial relationship, the baseline establishment rules *cannot be regarded as merely incidentally or inadvertently aimed at* the conservation of clean air in the United States for the purposes of Article XX (g). *Gasoline* App., at 17 [emphasis added].

¹⁵⁵ *Shrimp* App., at para. 139.

¹⁵⁶ *Id.*, at para. 140.

¹⁵⁷ *Id.* [emphasis added].

¹⁵⁸ *Id.* at para. 141 [emphasis added].

remarkable efforts to articulate a novel implication on the element of "relating to" in Article XX (g). By introducing the new concept of "substantial relationship," the influence of previous "primarily aimed at" test thus has faded, although the latter, basically, has not been entirely discarded. Let alone, it is clear that the interpretative approach taken in the *Tuna* cases for this test has not influenced the shrimp decision.¹⁶⁰ The new formula of interpretation literally is closer to the treaty language of "relating to," and therefore proves more persuasive. Nevertheless, by incorporating some supplemental elements, like proportionality and reasonableness, the application of the "relating to" might be run restrictively in order to deter the abuse of paragraph (g).

(ii) The content of exhaustible natural resources

The term of "exhaustible natural resources" in Article XX (g) has long been given a relatively broad definition in the WTO/GATT regime. In effect, natural resources, irrespective of living or non-living, including stocks of salmon,¹⁶¹ dolphins,¹⁶² gasoline¹⁶³ and even clean air,¹⁶⁴ have always been regarded as exhaustible natural resources. Nonetheless, since the *Tuna* dispute, the broad approach has never appeased the debate over whether the provision should cover living resources. Actually, the issue continued to be a controversy in the recent *Shrimp/Turtle* case. The previous tribunals' failure to craft substantial reasons in support of the broad application accordingly warrants a necessity for further clarification on this issue. The reasoning adopted by the *Shrimp* tribunal, mainly the Appellate Body, thus, is worth reviewing.

In line with the Mexico's argument in the *Tuna I* case,¹⁶⁵ the complaint parties in the *Shrimp* case, maintained that the term "*exhaustible* natural resources" refers to finite non-living resources such as minerals, which would be eventually depleted after gradual exploitation. Those living creatures, like sea turtles, therefore, could not constitute alleged natural resources within the meaning of paragraph (g) due to their

¹⁵⁹ *Id.* [emphasis added].

¹⁶⁰ Schoenbaum, "Shrimp-Turtle", at 37.

¹⁶¹ *Herring and Salmon*, at para. 4.4.

¹⁶² *Tuna II*, at para. 5.13.

¹⁶³ *Automobiles*, at paras. 5.60-5.61.

¹⁶⁴ *Gasoline Panel*, at para. 6.37; *Gasoline App.*, at 15.

¹⁶⁵ *Tuna I*, at para. 3.43.

renewable character.¹⁶⁶ Further, they argued that, if all natural resources fall within the definition of exhaustible natural resources, the term, exhaustibility, would become superfluous.¹⁶⁷

The Appellate Body rejected their narrow view mainly on the ground that they confused the concepts of exhaustibility and nonrenewability.¹⁶⁸ The tribunal correctly pointed out that exhaustible resources and renewable resources are not mutually exclusive because empirical experiences show that living species, even with the ability of reproduction, are not free from depletion, exhaustion and extinction.¹⁶⁹

Moreover, it stressed the necessity of keeping the interpretation of the WTO rules consistent with the contemporary environmental concern of international community. In the first place, the Appellate Body highlighted the preamble of the WTO Agreement, which has fully taken into account "the importance and legitimacy of environmental protection as a goal of national and international policy."¹⁷⁰ More important, it relied on several international environmental agreements covering living species in favour of its extensive view on the range of exhaustible natural resources.¹⁷¹ As a result, it concluded that:

We believe it is too late in the day to suppose that Article XX (g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. . . . We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX (g).¹⁷²

Indeed, it is fairly reasonable to assert that living things should fall within the range of exhaustible natural resources in light of the normal interpretation of treaty language, especially within the framework of international environmental agreements.

(iii) Measures are made effective in conjunction with restrictions on domestic production or consumption

¹⁶⁶ *Shrimp* Panel, at para. 3.237.

¹⁶⁷ *Id.*

¹⁶⁸ See McDonald, "Greening GATT", at n. 178.

¹⁶⁹ *Shrimp* App., at para. 128 [emphasis added].

¹⁷⁰ *Id.* at para. 129.

¹⁷¹ They include the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity, Agenda 21 of the UNCED, and the Resolution on Assistance to Developing Countries in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals. See *Shrimp* App., at para. 130.

¹⁷² *Id.* at para. 131.

Apart from requiring measure inconsistent to meet the policy goal of conserving exhaustible natural resources, paragraph (g) particularly adds the element of a parallel restriction on domestic production or consumption. The requirement inserted in the second clause of this exception has been generally regarded as a "logic and fair precondition to the availability of an Article XX (g) exception because, without equivalent domestic measures, parties could use Article XX (g) in a protectionist manner."¹⁷³ The legislative history of the GATT also shows that the aim of the additional condition is set to guard the exception against abuse.¹⁷⁴

Further, the second clause specifies the "link" between measures taken and the domestic restrictions as "are made effective in conjunction with." In the *Herring and Salmon* case, such connection was declared as "if it was primarily aimed at rendering effective restrictions on domestic production or consumption."¹⁷⁵ The Panel, unfortunately, had not provided a persuasive reason why such measure was imposed a duty to facilitate the domestic restrictions.¹⁷⁶ The subsequent panels, like the *Tuna* cases, constantly reiterated the rigid interpretation, but in absence of further elaboration on this language. In contrast to the *Tuna I* panel's silence on whether the US's tuna embargo met the requirement in the meaning of Article XX (g),¹⁷⁷ the *Tuna II* panel merely maintained that the coercive nature of the tuna imports ban distanced itself from "rendering effective restrictions on domestic production or consumption."¹⁷⁸

In the recent *Gasoline* case, the Appellate Body took a different stand from the *Herring and Salmon* panel, interpreting the terms of treaty as plain as possible in a manner that is concordant with their ordinary meaning. It thus maintained:

[t]he ordinary or natural meaning of "made effective" when used in connection with a measure -- a governmental act or regulation--may be seen to refer to such measure being "operative", as "in force", or as having "come into effect." Similarly, the phrase "in conjunction with" may be read quite plainly as "together with" or "jointly with." Taken together, the second clause of Article XX (g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. . . . [w]e believe that the clause. . . is appropriately read as a

¹⁷³ McDonald, "Greening GATT", at 448. See also Charnovitz, "Pelly Amendment", at 787.

¹⁷⁴ See International Trade Organisation: Hearing Before the Committee on Finance, 80th Cong., 1st Sess. 135, 412 (1947).

¹⁷⁵ *Herring and Salmon* Panel, at para. 4.6.

¹⁷⁶ See Charnovitz, "Pelly Amendment", at 787.

¹⁷⁷ *Tuna I*, at para. 5.31.

¹⁷⁸ *Tuna II*, at para. 5.27.

requirement that the measure concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline.¹⁷⁹

As a result, the Appellate Body considered that the second clause of paragraph (g) only requires *even-handed* treatment between restrictions on the imported product and domestic production.¹⁸⁰ By introducing the new concept of even-handedness, the tribunal apparently reversed the "effects test" proposed by the previous jurisprudence as an attempt to relieve an imposed measure of the burden to have effects upon domestic restriction for resources conservation.¹⁸¹

The infusion of this new consideration regarding the requirement has already influenced subsequent dispute. In deciding whether the US shrimp embargo is a measure operative in conjunction with domestic restrictions on shrimp harvesting, it appeared that the "even-handedness" test was reaffirmed and that it has entirely replaced the "effects" test. The Appellate Body observed that the restrictions on the harvesting of imported shrimp based on Section 609 had brought into effect together with corresponding restrictions on the US shrimp trawlers pursuant to the Endangered Species Act.¹⁸² Since both policies were *even-handed*, it was concluded that the measure of Section 609 met the specified condition of Article XX (g).¹⁸³

The recent WTO rulings, namely in the *Gasoline and Shrimp* cases, seem to suggest that the product banned or under restriction need not be identical to the natural resources sought to be conserved¹⁸⁴ as long as such restrictions are likely to promote the goal of conserving exhaustible natural resources. Thus, within the meaning of Article XX (g), a party may impose restrictions on imported gasoline to conserve clean air. Likewise, shrimps are allowed to be banned to protect the sea turtles threatened during the process of harvesting shrimps. The tolerance of the process or protection method (PPM) type of trade measures obviously is another indication of the WTO's flexible policy toward the interpretation on exceptional clauses. Surely, some WTO members who have been resisting the justification of the

¹⁷⁹ *Gasoline App.*, at 20. [citations omitted].

¹⁸⁰ *Id.* [emphasis added].

¹⁸¹ *Id.* at 21. Apart from deviating the ordinary meaning of the treaty language, practically, the effects test was rejected mainly because the difficulty to determine causation and a substantial time consumed to allow "effects" to occur as well. *See id.*

¹⁸² *Shrimp App.*, at para. 144.

¹⁸³ *Id.* at para. 145.

¹⁸⁴ The two rulings clearly rejected the Mexico contention in the *Tuna I* that the embargoed product should be the same as the item to be conserved. *See Tuna I*, at paras. 3.47; 3.50.

PPM measures would not welcome such decision. The serious concern has been expressed that, by permitting the PPM-based trade barriers, a door will be open to highly coercive measures through which economically powerful nations may effectively force less powerful nations to adopt particular production policies.¹⁸⁵ In balancing the tolerance of the PPM, the trade regime must employ the test of "close and real relationship between means and ends" as cautiously as possible on subsequent disputes in order to reduce the risk of causing a loophole by the potential abuse of the PPM measures.

Yet, while both cases heralded the permissibility of the PPM-based measures, they also showed that the object under domestic restrictions, like domestic gasoline or shrimp, was the same as the one subject to the restricted import. Arguably, it is hard to predict whether the WTO would be willing to justify certain type of import restrictions, like trade sanctions, which are normally imposed without simultaneous domestic restrictions on the same products that are embargoed.

(e) The chapeau of Article XX

The provisional justification of a measure under a certain exception does not necessarily guarantee its ultimate legality under Article XX. Such measure must also satisfy the requirements in the introductory note of Article XX, the chapeau. The chapeau prohibits the application of a measure in a manner that would constitute (a) arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (b) a disguised restriction on international trade.

(i) The significance of the chapeau requirements

The drafting history of the GATT shows that the initially proposed chapeau language by the US was "unqualified and unconditional."¹⁸⁶ The addition of such qualification was proposed by the United Kingdom as a device to prevent abuse of the

¹⁸⁵ Perkins, "Shrimp Prohibition", at 119. Thailand assumed that the new approach "will result in an explosive growth in the number of environment (perhaps labor) measures applied to PPMs and justified pursuant to Article XX, . . . is likely to have profound systemic implications for the future application of the WTO rules and disciplines." See *Environment: WTO Formally Adopts Shrimp-Turtle Ruling As Thailand Fears Victory May be Pyrric*, 15 Int'l Trade Rep. 1884 (BNA) (Nov. 11, 1998).

¹⁸⁶ See *Shrimp App.*, at para. 157. The chapeau of Article 32 of the United States Draft Charter for an International Trade Organization read:

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures: . . .

specified exceptions.¹⁸⁷ Although, it is the right of a party to invoke an exception so as to override its substantive obligations, some duties also should be fulfilled to ensure that legal rights of other parties would not be unreasonably disregarded by abusing or misusing such exceptions. The necessity of reaching such balance by instituting substantial requirements in the chapeau, thus, was well-confirmed by the WTO Appellate Body in the *Gasoline* case, which stated:

The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of other parties concerned.¹⁸⁸

The significance of the chapeau requirements, notably the hindrance of the undesirable consequence resulting from abusing or misusing the exceptions, was elaborated in-depth in the recent *Shrimp/Turtle* case. The Appellate Body, reaffirming its the previous observation in the *Gasoline* case, particularly stressed that "Exercise by one Member of its right to invoke an exception, such as Article XX (g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Member."¹⁸⁹ To further its argument, it also pointed out:

To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.¹⁹⁰

Moreover, the tribunal noted the real association of the mandate embodied in the chapeau of Article XX with the *principle of good faith*, a general principle of law and international law as well.¹⁹¹ It regarded the doctrine of *abus de droit* as an application

¹⁸⁷ UN Doc. EPCT/ C.II/ 50, at 7, 9; E/PC/T/C.II/54/Rev. 1, at 36, 28 Nov. (1946).

¹⁸⁸ *Gasoline* App., at 22.

¹⁸⁹ *Shrimp* App., at para. 156.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at para. 158.[emphasis added].

of this general principle, which "prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."¹⁹²

In contrast to the exceptional clauses in article XX, arguably, much less attention had been paid to the interpretation and application of the chapeau language during the past GATT rulings.¹⁹³ In the light of the above two cases, the trend has been effectively altered. In short, the considerable ink spent in the elaboration of the chapeau principles by the new WTO dispute settlement body seems indicative of its tendency to put more emphasis on the application of the chapeau.

(ii) Arbitrary or unjustifiable discrimination

a. Basic observation

First, by reading the express terms of the chapeau, it is clear that the provision concerned focuses on whether the *manner* in which that measure is applied may amount to such discrimination rather than the *measure itself* or its *content*. In effect, the clause demands that all the relevant circumstances surrounding the application of the measure be taken into account. Several GATT/WTO rulings have confirmed such finding.¹⁹⁴ But, in the recent case, the basic understanding has been broadened to cover the substantive aspect of the measure. In the *Shrimp/Turtle* case, the Appellate Body regarded the measure as being in breach of the chapeau "when the detailed operating provisions of *the measure* prescribe the arbitrary or unjustified activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable *manner*."¹⁹⁵ It declared, accordingly, that "The standards of the chapeau, in our view, project both *substantive* and *procedural* requirements."¹⁹⁶ The extensive perception toward the language of the chapeau, indeed, is a departure from its plain meaning. Yet, such perception reveals again the tendency of the WTO tribunals to rely increasingly on the chapeau requirements to curb the deliberate invocation of the exceptions.

Second, the alleged "discrimination" prohibited by the chapeau has a different

¹⁹² *Id.* [citation omitted].

¹⁹³ See Schoenbaum, "Reconciling Trade and Environment", at 274. Only few cases addressed the chapeau's requirements. See *United States--Imports of Certain Automotive Spring Assemblies*, adopted on 26 May 1983, BISD 30S/107, at paras. 54-55[hereinafter *Automotive*]; *Canada Tuna*, at para. 4.8.

¹⁹⁴ See *Automotive*, at para. 56; *Gasoline App.*, at 20.

¹⁹⁵ *Shrimp App.*, at para. 160 [emphasis added].

¹⁹⁶ *Id.*

implication from the substantive obligations of the GATT specified in Article I and III. Jackson has depicted such use of the chapeau as a "softer" form of the GATT obligations.¹⁹⁷ The non-discrimination requirement is softened mainly in two spheres. First, the context of the chapeau apparently provides that certain forms of discrimination may be permissible as long as they are non-arbitrary or justifiable. Second, there is no "like product" element in the context. It has been thus correctly observed that "Rather than considering whether like products from different countries have equal opportunities in the domestic market, Article XX examines whether countries "where the same conditions prevail" are treated in an arbitrary or unjust fashion."¹⁹⁸

The distinctive feature between the non-discrimination principle in the chapeau and that in the basic GATT rules has been succinctly addressed in the *Gasoline* case. The Appellate Body maintained:

The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. . . . The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified.¹⁹⁹

Third, the question has been raised as to what is the geographic range of the term "between countries where the same conditions prevail." The recent WTO practices show that such scope of "countries" between which the discrimination may occur tend to be as extensive as possible. In the *Gasoline* case, the Appellate Body accepted the US's contention that the phrase refers to not only between different exporting countries, but also between exporting countries and importing countries.²⁰⁰ The finding also prevails over the subsequent *Shrimp/Turtle* case.²⁰¹

b. "Unjustifiable discrimination" between countries where the same conditions

¹⁹⁷ Jackson, *World Trading System*, at 234.

¹⁹⁸ Charnovitz, "Pelly Amendment", at 778-79.

¹⁹⁹ *Gasoline App.*, at 20. See also *Shrimp App.*, at para. 150.

²⁰⁰ *Gasoline App.*, at 21.

prevail

It has been generally observed that the terms, like "arbitrary, unjustifiable, or disguised," used in the chapeau are not beyond ambiguity.²⁰² Previous GATT dispute settlements had not effectively contributed to the clarification of these terms.²⁰³ Thus, the ill-defined text would allow tribunals to generate various interpretations, notwithstanding by using wide or narrow approach. The Appellate Body's *Gasoline* decision was considered as that it "provides an authoritative interpretation of the chapeau."²⁰⁴ In spite of such achievement, the tribunal did not give separate interpretations for the three standards. Rather, it tended to apply those concepts altogether on the ground that all of the chapeau's requirements are aimed at avoiding abuse or misuse of the general exceptions. In the view of the tribunals, those standards, to large extent, appear interchangeable. The Appellate Body defined the interaction among the requirements as:

"Arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised *discrimination* in international trade. It is equally clear that *concealed or unannounced* restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of consideration pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.²⁰⁵

Further, in the tribunal's mind, a measure inconsistent, even justified by certain exceptional clause, could be in breach of conditions in the chapeau if other non-discriminatory options are still reasonable available to the acting party.²⁰⁶ In short,

²⁰¹ *Shrimp App.*, at para. 150.

²⁰² See Jackson, *GATT*, at 744.

²⁰³ *Id.*

²⁰⁴ Schoenbaum, "Trade and Environment", at 275.

²⁰⁵ *Gasoline App.*, at 25.

²⁰⁶ The Appellate Body maintained that the US could have avoided the discriminatory measures against foreign refiners either by imposing statutory baselines on both domestic and foreign producers, or by making individual baselines available to all. The excuses for not following the options, like administrative difficulties and problems of verification and enforcement, were rejected by the Appellate

arguably, the Appellate Body was inclined to attach the requirement of *necessity* to the non-discrimination principle in the chapeau.

The consistency between extraterritorial application of trade measures for environmental purposes and the chapeau's requirements was not seriously explored until the recent *Shrimp/Turtle* judgement by the WTO Appellate Body. Before the release of the decision, there had been no opportunity for the chapeau to be applied in a similar dispute because the use of environmental trade measure, as judged in the two *Tuna* cases, failed to satisfy any individual exceptions of Article XX. Furthermore, in contrast to the *Gasoline* ruling examining the elements of the chapeau jointly, as indicated above, the *Shrimp/Turtle* decision remarkably did produce a separate assessment for above requirements. The following details first how an environmental measure may amount to an unjustifiable discrimination.

The Appellate Body found that "unjustifiable discrimination" would occur in the application of a trade restriction not only when exporting countries were under different treatment, but also when the application of the measure did not pay due regard to the particular situation of the countries being targeted.²⁰⁷ In terms of the latter's instance, the tribunals maintained that the US Section 609 imposing shrimp imports ban against several Asian countries, in the manner of its application, constituted an unjustifiable discrimination for those Asian exporting countries. Section 609, as observed, simply requires shrimp exporting countries to adopt identical turtle-protection methods as those enforced in the US in order to be certified for shrimp importation. The policy, in effect, operated without taking into account other alternative conservative measures taken by an exporting country and different conditions that may happen in those countries as well.²⁰⁸ On the other hand, apart from the environmental standards shaped exclusively by the US administration, the regime of certification also operate unilaterally regarding the grant, denial or withdrawal of it.²⁰⁹ Hence the Appellate Body ruled that "The unilateral character of the application of Section 609 heightens the disruptive and *discriminatory* influence of the import prohibition and underscores its *unjustifiability*."²¹⁰

Body because those hurdles were not impossible to be overcome. Thus, the tribunal concluded that "The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable." See *Gasoline* App., at 28.

²⁰⁷ *Shrimp* App., at para. 165.

²⁰⁸ *Id.*, at paras. 163, 164.

²⁰⁹ *Id.* at para. 172.

²¹⁰ *Id.* [emphasis added].

Moreover, the Appellate Body found that the US measure also amounted to "unjustifiable discrimination" between the shrimp exporting countries because, apparently, countries under shrimp embargoes were subjected to differential treatment in three aspects. First, unlike those countries with which the US has already concluded a regional international agreement for protection and conservation of sea turtles: The Inter-American Convention, the US failed to enter into any serious negotiation with those embargoed nations in an attempt to reach agreements for establishing consensual means.²¹¹ The tribunal, thus, found that "[t]he United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable."²¹²

Second, different treatment occurred when the embargoed Asian exporting countries were offered relatively shorter periods of adjustment of their fishing policy. Fourteen countries in the wider Caribbean/western Atlantic region had enjoyed "a "phase-in" period of three years during which their respective shrimp trawling sectors could adjust to satisfy the requirement of using TEDs."²¹³ By contrast, the other countries, like those Asian nations, had only "four months" to implement the required conservative measure.

Third, the US had made much effort in transferring TED technology to specific countries, basically the fourteen countries mentioned above. But, there was no evidence to indicate the same level of effort that had been made by the US for other exporting countries mainly due to the limited "phase-in" periods.

In short, an environmental trade measure cannot be deemed as a justifiable discrimination as long as the target party is barred from the equal treatment by the acting State, even though the measure was justified under individual environmental exception.

²¹¹ The Appellate Body noted that the requirement to pursue concerted and consensual actions normally by concluding international agreements before the importation of import ban has been specified in many national or international documents. For instance, the US Section 609(a), *inter alia*, directs its administration to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles. Further, as we have addressed in chapter six of the thesis, many international environmental documents, namely Principle 12 of the Rio Declaration and Agenda 21 all advocate such mandate. The Report of the Committee on Trade and Environment as a part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference also endorsed and supported the requirement. *See id.* at paras. 167, 168.

²¹² *Shrimp App.*, at para.172.

²¹³ *Id.* at para. 173.

c. "Arbitrary discrimination" between countries where the same conditions prevail

Like "unjustifiable discrimination," the concept of arbitrary discrimination was not dealt with separately and seriously until the emergence of the *Shrimp/Turtle* dispute. The Appellate Body found that the implementation of Section 609 also amounted to an arbitrary discrimination. In its reasoning, the tribunal seemed to largely confine the implication of the requirement to the issue of whether the US law was in conformity with justice and fairness during the process of handing the certification.

First of all, it said the *rigidity* and *inflexibility* within the determination for issuing a certification constituted an arbitrary discrimination.²¹⁴ Moreover, a considerable flaw also became evident in the certification processes. It was observed that the process of certification was neither *transparent* nor *predictable*.²¹⁵ The decision to grant or to deny certification was made exclusively by the US officials without offering an applicant country any opportunity to defend its policy. Countries whose applications were denied did not receive notice of such denial or of the reasons. Nor was there any review or appeal mechanism for that decision.²¹⁶

In assessing the process of certification, the tribunal concluded that:

The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. These appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States.²¹⁷

Therefore, given the lacking of basic fairness and due process for those countries whose applications were rejected, the Appellate Body ruled that the parties affected were discriminated against, *vis-à-vis* those countries that were granted certification.²¹⁸

(iii) Disguised restriction on international trade

The invocation of exceptional clauses may serve protectionist ends. Hence the

²¹⁴ *Id.* at para. 177 [emphasis added].

²¹⁵ *Id.* at para. 180 [emphasis added].

²¹⁶ *Id.*

²¹⁷ *Id.* at para. 181.

²¹⁸ *Id.* Apart from the inconsistency of Section 609 with the non-arbitrary requirement in the chapeau of Article XX, the application of the law also was regarded contrary to the spirit of Article X:3 of the GATT 1994, which requires "minimum standards for transparency and procedural fairness in the administration of trade regulations . . .". See *id.* at paras. 182, 183.

element of prohibiting the "disguised restriction" on international trade within the chapeau is designed to deter the abuse of those exceptions from protecting domestic production.²¹⁹ The GATT practices, however, indicate that this anti-protectionism mandate has not been properly applied. Rather, so far, this rule has only performed a limited function. The narrow application of "disguised restriction" was reflected in the two GATT panel reports in 1980s. In the 1982 "US--prohibition of imports of Tuna and Tuna Products from Canada," the Panel found that the import ban on Canadian tuna was not a "disguised restriction on international trade" on the ground that the measure "had been taken as a trade measure and publicly announced as such."²²⁰ Similarly, the Panel in the 1983 "United States--Imports of Certain Automotive Spring Assemblies" denied the breach of the element by the US's restriction mainly because the measure in question was "published in Federal Register."²²¹

This approach, which merely defined the "disguised restriction" element as a "transparency requirement,"²²² not surprisingly, aroused the disagreement and criticism from the GATT parties²²³ and scholars²²⁴ as well. In particular, disapproving the reasoning of the 1982 US's tuna imports ban, some writers pointed out that a "disguised restriction" should not only cover trade measure but also include non-trade methods.²²⁵ They, nonetheless, noted that a narrow view of the element is perhaps acceptable whenever a measure provisionally satisfies the exceptional paragraph (g), since the provision has already required parallel domestic restrictions.²²⁶ It is always essential, however, for a measure justified under other exceptions that do not specify the same limitation as paragraph (g) to be subjected to a thorough examination by the anti-protectionism device. Thus, a careful stand toward the application of the "disguised restriction" still ought to be pursued.

The assessment on the consistency of trade restrictions aimed at influencing environmental practice abroad with the "disguised restriction" requirement remains

²¹⁹ See Charnovitz, "Environmental Exceptions", at 47-48.

²²⁰ *Canada Tuna*, at para. 4.8.

²²¹ *Automotive*, at paras. 54-55.

²²² See Charnovitz, "Environmental Exceptions", at 48.

²²³ See GATT, 35S/107-108; GATT Doc. C/M/155 at 13.

²²⁴ It has been contended that "Both panels appears to have misconstrued the 'disguised restriction' portion of the chapeau. . . . What at issue is whether trade restrictions ostensibly justified under one of the Article XX exceptions are really imposed for protectionist reasons." See Schoenbaum, "Reconciling Trade and Environment", at 274, n. 42.

²²⁵ Trebilcock and Howse, *International Trade*, at 344.

²²⁶ *Id.*

important. The tribunals in the *Shrimp/Turtle* case, in spite of making considerable efforts to elaborate the significance of non-discrimination elements in the chapeau, missed the opportunity to clarify the meaning of "disguised restriction" for the environmental measure in question. The omission probably resulted from the finding that the US's shrimp import ban has already fulfilled the paragraph (g) of Article XX.

Nevertheless, in the foreseeable future, when a trade measure is justified under Article XX (b), the implication of "disguised restriction" still needs to be explored in order to effectively check any measures that is actually imposed to mask protectionism under the guise of preserving environment.

(f) Concluding remarks

While the use of trade measures in pursuit of transboundary environmental goals is largely violations of the basic WTO/GATT obligations in Article I or XI, their ultimate justification essentially relies on the qualification of exceptional clauses listed in Article XX, particularly, paragraph (b) and (g). Further, those measures, even, on their face, falling within the scope of exceptional clause, either (b) or (g), must stand the test of the chapeau requirements to ensure the eventual legality.

The traditional tendency of rebutting trade measures imposed to address international environmental issue, evidenced in the treatment of PPM- style trade restrictions by the previous two *Tuna* decisions, has been substantially reversed by the latter WTO judgement. The *Shrimp/Turtle* judgement has showed a great willingness of the WTO to allow environmental measures to be justified under certain exceptional clause, mainly paragraph (g)--the conservation of natural resources. In contrast to the *Tuna/Dolphin* decisions, the tribunal effectively lessened the strictness of construing the elements of paragraph (g), adopting a more flexible approach. The modification becomes evident, *inter alia*, in the possible acceptance of extraterritorial application of environmental measures and the tolerance for a PPM measure where embargoed products are not necessarily same as the objects to be conserved. As a result, the WTO seems to approve, even not explicitly, the permissibility of using trade measures to protect the environment beyond national border.²²⁷ The result, as Schoenbuam remarks, "showed a new understanding and sympathy for international

²²⁷ Mann, "Revolution and Result", at 32; Dunoff, "Border Patrol", at 25; Schoenbuam, "Shrimp-Turtle", at 38-39.

environmental law and the importance of environmental goals.²²⁸ Given the absence of a proper interpretation of paragraph (b) in the recent trade-related environmental dispute, it is uncertain whether, in the future, the tribunal will be ready to alter the rigid less-restrictive test, which has long dominated the "necessity" requirement in paragraph (b). If the test remains intact, it is possible that the parties taking the measures will be encouraged to invoke paragraph (g) rather than (b) for vindicating the measure inconsistent.

The inclination of the WTO to take an extensive view toward the application of the environmental exceptions, however, does not imply that it would endorse the unrestrained national use of environmental measures at any cost. Rather, by the WTO's extraordinary elaboration on the chapeau's requirements listed in Article XX, the chapeau has become a dynamic device to hinder the abuse and misuse of exceptional clauses. Those undesirable characteristics embodied in the unilateral environmental trade measure, such as unpredictability, non-transparency and unilateralism, all have been considered inconsistency with the chapeau's mandates. As a result, whenever an environmental exception is invoked, the WTO tribunals would be reasonably likely to open the gate for such measures under certain exceptional clauses, but simultaneously could take a rigid approach toward the interpretation of the chapeau language. It is not necessarily accurate, therefore, to say that any future invocation of an environmental trade measure definitely has a good chance to survive the novel WTO/GATT jurisprudence.

On the other hand, as the WTO/GATT system has tolerated the PPM restrictions under certain circumstances, it is uncertain to what extent the regime will tolerate the imposition of environmental trade sanctions, which are distinct from PPMs to certain degree and apply normally to unrelated products. Since the WTO/GATT has actually not yet dealt with environmental sanctions, the Pelly-type sanctions imposed against Taiwan offer an excellent chance to perceive and simulate how the WTO would judge the measure.

C The Pelly sanctions and the WTO/GATT

A hypothetical case study, following the usual WTO/GATT proceeding order,

²²⁸ Schoenbuam, *id.* at 38. See also Dunoff, *id.* at 24.

will be first asking whether the Pelly trade sanctions violated the primary obligations provided in GATT 1994. If a breach of the WTO/GATT basic principles is found to occur, then the study will proceed to discuss whether the trade embargo aimed at preserving endangered rhinos and tiger might be saved by the general exceptions of Article XX. Inspired by the previous GATT practices, the implication of Article XX over the environmental trade sanctions shall be a focal point of the study. Moreover, to reflect the current development of the WTO jurisprudence, of course, the case will be assessed on the basis of the prevailing legal jurisprudence emanated from the recent judgements.

1 Were the Pelly sanctions in violation of principal obligations of the GATT rules?

It is true that the WTO/GATT regime has never dealt with the legality of environmental sanction, like the Pelly actions.²²⁹ The previous GATT judgements thus were unable to provide an effective reference for the assessment of such trade measure. The Pelly sanctions, however, theoretically, could be contrary to several basic principles of the GATT.

First of all, it might violate the most-favored-nation (MFN) principle specified in Article I: 1 of GATT 1994. As indicated, when the Pelly sanctions were implemented in 1994, the US President banned the imports of certain wildlife products from Taiwan, such as products of bird feather. Meanwhile, "the like product" from other countries continued to be permitted to enter the US's market. As a result, Taiwan was deprived of the advantage resulting from the importation of the like products to the US. The plainly differentiated treatment inflicted on Taiwan thus could not be consistent with the MFN principle.

The Pelly trade sanctions would also be in breach of Article XI:1, which requires the general elimination of quantitative restrictions, *inter alia*, forbidding the restrictions on the importation of any product from any other members. The sanctions required by the Pelly Amendment were strictly confined to the measures of the imports ban. In effect, the imposition of the Pelly trade embargo constituted a direct prohibition or restriction on the importation of wildlife products from Taiwan. The trade sanctions were, therefore, contrary to Article XI: 1 and plainly cannot meet any

²²⁹ In the *Tuna I* case, the Mexico did raise the issue of the legality of the US Pelly Amendment under the GATT rules. The GATT panel dismissed the complaint, simply because the Pelly trade embargo was not in effect. See *Tuna I*, at paras. 5.20, 5.21.

exceptional clauses provided in the second paragraph of the same article.²³⁰

A question may be raised as to the consistency of the Pelly sanctions with the national treatment requirement in Article III of the GATT. The principle simply prohibits the differing internal measures, like taxation and regulation, imposed on foreign and domestic like products. Thus, the principle is not applicable to the situation where pure imports ban is implemented, like the Pelly sanctions, which involves no other internal measures.

2 The justification of the Pelly trade sanctions under Article XX

The analysis will be first placed on if the Pelly sanctions qualify individual exceptions, namely paragraph (b) and/or (g).

(a) Article XX (g)

(i) The range of "exhaustible natural resources"

In line with the complainants in the *Tuna* and *Shrimp* cases, Taiwan may contend Article XX (g) is not applicable to the Pelly sanctions, which were launched to conserve the "living creatures"-- rhinos and tigers. The contention is based on the proposition that the paragraph, inherently, should cover only non-living natural resources rather than living things. Taiwan also may further point out that the qualification of the exceptional clause for a Pelly action should be subjected to one specified provision rather than multilateral standards embodied within paragraph (b) and (g). Unfortunately, the country may find it difficult to persuade the WTO to take such view due to the long-term practices of the GATT/WTO, which has repeatedly confirmed that the range of natural resources in Article XX (g) does comprise living things.

(ii) Is the US allowed to show its concern over species located beyond its border by invoking a trade measure?

As indicated, the *Shrimp* decision suggested that the geographic scope of natural resources provided in Article XX (g) is no longer been confined to the area under national jurisdiction. But, it does not mean that an acting party is permitted to take

²³⁰ Article XI: 2 of GATT 1994 specifies three exceptions to the general principle of eliminating quantitative restrictions. However, none of them can be applied to the trade sanctions for environmental

any extraterritorial environmental trade measures without any limitation. To vindicate the Pelly sanctions under the exception, the US must prove there is a 'sufficient nexus' between it and those endangered rhinos and tigers.

Not surprisingly, Taiwan may argue that no such 'nexus' can be found in this case. First, unlike migratory marine species, such as dolphins or sea turtles, which are subject to no specified jurisdiction, rhinos and tigers, as land-based species, fall entirely the ambit of the sovereignty of producer States.²³¹ It is clear that the US does not exercise jurisdiction over such endangered species, which belong to the habitat countries, like African nations, India or Russia. Taiwan, therefore, may claim that the Pelly sanctions are not within the scope of Article XX (g) because of the absence of a nexus between them.

Although there seems not a "sufficient nexus", as in the Shrimp case, between those endangered species involved and the US, the US may claim a connection with rhinos and tigers on the proposition that States have a "global environmental right" to expect that endangered species will be protected.²³² Also, the US may stress that the preservation of endangered species which the Pelly sanctions were aimed to enforce arguably appears a community interest or a common concern. Thus, the US may claim a linkage with those species, even though the US does not exercise jurisdiction over them. Overall, the US could say that the relation between the species and the US is sufficient to guarantee the existence of such nexus, which links the species to all countries in the world. Alternatively, the US may simply say that it is redundant to formulate the alleged "nexus" test in this exceptional clause. Since rhinos and tigers are "exhaustible natural resources", the US may straightforwardly argue that its trade sanctions designed to protect those species surely met the element of "conservation of natural resources" under Article XX (g).

The 'nexus' requirement, although not found in the wording of Article XX (g), represents a delicate balance between the contention that exceptional clauses shall be essentially designed for national interests and the proposition that the provision ought to shoulder the responsibility to preserve the global environment. It seems impossible for the WTO to scrap the new established criteria instantly. With respect to case of

purpose. See Charnovitz, "Pelly Amendment", at 776; McDorman, "Fish Import Embargoes", at 513-15.

²³¹ See Birnie and Boyle, *International Law and Environment*, at 443.

the Pelly sanctions against Taiwan, if the WTO continues to refer to the approach adopted in the *Shrimp* case, which tended to confine the 'nexus' to the exercise of certain jurisdiction over natural resources, it probably would deny the existence of a sufficient nexus between the species and the US. In addition, partly because the inclusion of endangered species as "common heritage of mankind" has not yet won the universal acknowledgement, the WTO may be unwilling to accept that the nexus between the US and African rhinos and Indian tigers is 'sufficient', even if a certain nexus might be present. However, once species protection has been well recognised as a common obligation,²³³ it is not impossible that the WTO may expand the test of a sufficient nexus beyond national jurisdiction and endorse trade measure imposed for protecting a community interest, such as endangered species.

(iii) Were the Pelly sanctions "relating to" the conservation of rhinos and tigers?

Apart from the above condition, the US has to further demonstrate that its trade embargo against Taiwan met the condition regarding the "linkage" between the measures imposed and the conservative goal it sought to pursue, namely the element of "relating to". As the "primarily aimed at" test has been weakened by the *Shrimp* adjudication, the tribunal, relying on the new standard, has to decide whether the Pelly sanctions had a "substantial relationship" with the policy objective of conserving endangered rhinos and tigers.

Based on the finding of the *Shrimp* case, Taiwan surely disagrees that there was a "close and genuine" connection between the measure and the policy goal. In contrast to the *Shrimp* embargo, a typical PPM measure, which was triggered by the situation where the method of harvesting shrimp will affect the life of sea turtles, the Pelly sanctions, Taiwan may argue, by nature, were a penalty against Taiwan's insufficient environmental efforts.²³⁴ The sanctions simply targeted those unrelated wildlife products. The environmental embargo thus could not constitute an alleged "means" reasonably related to the "ends" of saving rhinos and tigers.

The US perhaps would admit the difference between a PPM-style trade

²³² It has been argued that States are entitled to expect that endangered species will be protected due to the status of those species as a global environmental resource. See Glennon, "Elephant", at 34-35 and chapter two of the thesis.

²³³ See discussion in chapter two regarding the status of preserving species.

restriction and the Pelly sanctions. Nonetheless, it could propose that the Pelly sanctions were not merely a penalty, which, like the PPM method, were actually devised to influence target countries to advance their environmental practices. Such similarity, therefore, shall allow the Pelly sanctions to become a measure having a substantial relationship with the goal of conserving rhinos and tigers.

The tribunal may note, on one hand, that the PPM and the Pelly sanctions do perform a similar function. On the other hand, strictly speaking, it probably remains difficult to convince the tribunal that there was a close and real connection between the Pelly import ban on the products of bird feather from Taiwan and the goal of saving unrelated rhinos and tigers.

(iv) Were the Pelly sanctions imposed in conjunction with domestic restrictions on production or consumption?

Finally, the US would have to prove that its Pelly actions fulfill the requirement that the measures were in force "jointly with parallel domestic restrictions on production or consumption." Taiwan may argue that Article XX (g) inherently is not applicable to the use of trade sanctions simply because the measures normally lack domestic restrictions on production or consumption on the embargoed products. For instance, in this dispute, while the importation of a number of wildlife products were banned from Taiwan, it appeared that the US did not domestically prohibit the production or consumption of those wildlife products, like bird feather and so on. Further, Taiwan may point out that the Pelly environmental sanctions differed from the *Shrimp* embargo, in which the US import ban on shrimp was implemented in conjunction with restrictions on domestic harvesting of shrimp.

Instead of referring to the recent *Shrimp* adjudication, the US perhaps may alternatively urge the adoption of even broader application of this parallel domestic requirement. It could propose that the items under domestic restrictions might not necessarily be the same as products embargoed. The proposal requests that an environmental sanction qualify the requirement of parallel domestic restrictions as long as domestic conservative measures over natural resources, such as prohibition on consumption of those endangered species, are taken. Overall, relying on that its

²³⁴ Charnovitz, "Environmental Confronts GATT Rules", at 43. See also McDonald, "Greening GATT", at 459.

Endangered Species Act ²³⁵ has soundly implemented the treaty obligation of CITES,²³⁶ the US may argue that the Pelly sanctions against Taiwan were a measure carried out in conjunction with domestic restrictions.

The *Shrimp* judgement did suggest that the alleged "domestic restrictions" may be open for redefinition in order to accommodate the need to protect the environment. Yet, it seems too early to say the WTO would instantly endorse the US's argument regarding the interpretation of the requirement. If the WTO upholds a strict interpretation on the 'parallel restrictions on domestic and imported products,' the US will find it difficult to persuade the regime to accept its contention. By contrast, it remains possible that the WTO might loose the requirement of 'domestic restrictions' to the extent that an implementation of the restrictions on production or consumption of natural resources is sufficient, even though no identical domestic restrictions on the products being embargoed have been imposed. In doing so, the Pelly sanctions could stand the test of the requirement.

(b) Article XX (b)

It is true the rhinos and tiger species that the Pelly sanctions were designed to protect are covered by the policy goal of paragraph (b)-- the protection of animal life. Taiwan can hardly dispute this point. However, like the *Tuna I and II* disputes, the question could be raised as to the geographic limitation of this provision. Arguably, paragraph (b) has not yet been interpreted to include the living things beyond the jurisdiction of country taking the measure. Thus, Taiwan could contend that the Pelly sanctions did not satisfy paragraph (b) because those living things, like rhinos and tigers, which the sanctions aimed to preserve, are not within the jurisdiction of the US.

Given the flexible approach toward the geographic limitation on natural resources taken by the recent WTO decision, paragraph (b), in the future, would be increasingly likely to be interpreted to cover extraterritorial living creatures. In doing so, under the paragraph, the US probably would be allowed to show its concern on the "African" rhinos or "Indian" tiger by using trade measures. However, on the other hand, the US probably must demonstrate that it also met the "sufficient nexus" test in

²³⁵ 16 U.S.C. 1531-1543.

order to ensure the linkage between itself and the objects to be preserved. Inspired by the above examination on the consistency of the Pelly sanctions with paragraph (g), it might be concluded by the WTO that the environmental embargo was not a measure to protect animal life for the purpose of Article XX (b) because there was a scant "sufficient nexus" between the species and the US.

Even if the US's Pelly sanctions could stand the test of the above requirements, the crucial point rests on whether the US could succeed in convincing the WTO that the trade embargo could fulfill the "necessity" condition within paragraph (b). By honouring the less-restrictive-measure formula, Taiwan, certainly, would argue that the Pelly sanctions were not a "necessary measure" to achieve the goal of protecting endangered species. It could stress that, apart from trade sanctions, other alternatives consistent with the GATT rules to save rhinos and tigers were still reasonably available to the US. The US could have taken other non-coercive measures to help Taiwan halt illegal trade in parts of rhinos and tiger. A more effective method by which Taiwan could catch the tempo of global efforts to protect endangered species thus appears to be by international cooperation and assistance, like transferring of technology and know-how, rather than coercive trade embargoes. In addition, helping Taiwan enter into CITES is a direct way through which Taiwan is able to access the new approach of protecting endangered species. Unfortunately, the US did not engage in those methods before imposing a trade sanction against Taiwan, despite the fact that it started to provide Taiwan some sort of carrots after launching the sanctions.

The US might defend the consistency of the trade measure with Article XX (b) by urging the WTO to embrace an innovative concept of the necessity requirement. The US may highlight the fact found by CITES that species of rhinos and tiger have been threatened with extinction. Then, it may request the tribunal, as Charnovitz speculated, to "take into account the irreversibility of species loss in determining the necessity of a sanction."²³⁷ Further, it may argue that other non-trade measures, even still available, are insufficient to prevent rhinos and tigers from the brink of extinction. A drastic action, such as trade sanctions, therefore, must be taken. The proposition that the urgency to save those species and the ineffectiveness of other

²³⁶ The implementation of the US's CITES obligations by the Endangered Species Act (ESA) *see* Patel, "Endangered Species", at 173-78. Apart from the ESA, the Lacey Act is another significant US law aimed to conserve wildlife through the regulation of commerce. *See* Patel, at 178-80.

non-coercive measures guarantee the necessity of imposing trade sanctions, undoubtedly, may win some sympathy from the WTO, because the regime has become increasingly sensitive to the significance of protecting the global environment. So, Charnovitz proposed that the "precautionary principle," one of the noted environmental principles, if adopted, may provide a basis for the WTO tribunal to make such judgement.²³⁸

Apart from the current conservative stand of the WTO toward the precautionary principle,²³⁹ there might be some hurdles, however, which may dissuade the WTO from endorsing the assumed stance. As observed, placing environmental emergencies over normal trade rules would encourage countries to employ trade sanctions to prevent species extinction.²⁴⁰ Moreover, such broad interpretation of the necessity requirement could reduce the WTO regime to a situation where international environmental norms are allowed to be enforced by a single party with powerful economic might. As a result, the WTO regime would be in danger of usurping the enforcement function that should have been fulfilled by other competent institutions. Further, the WTO's tolerance of this alleged necessary measure may lead to the infringement of the integrity of certain enforcement mechanisms in international environmental regime.

Since the creation of the WTO's new dispute settlement mechanism, the least-GATT-inconsistency test has remained intact. It is hard to predict under what circumstance the rigid test may be challenged successfully and, thus, to what extent it may be altered. The US's hesitance to invoke Article XX (b) in the *Shrimp* case indicates that it is quite aware of the situation where the strictness embodied in the

²³⁷ Charnovitz, "Pelly Amendment", at 796. See also Weiss, "Trade and Environment", at 733.

²³⁸ Charnovitz, "Pelly Amendment", at 796. Evidenced in a number of treaties and State practice, the precautionary action is a new important principle codified by the 1992 Rio Declaration in Principle 15, which reads:

In order to protect the environment, the precautionary approach shall be widely applied by State according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

However, the precise formulation of this principle varies in each document. See generally Sands, *Principles*, at 209.

²³⁹ In the *Hormones* case, the Panel found that "even if the precautionary principle is considered customary international law, it would not override explicit provisions of the WTO Agreements." EC Measures Concerning Meat and Meat products, 18 Aug. 1997, WT/DS26/R/USA, at para. 8.157. In line with the Panel stand, the Appellate Body concluded that the "principle, at least outside the field of international environmental law, still awaits authoritative formulation" and that it "does not override" the provisions of the Uruguay Round texts. EC Measures Concerning Meat and Meat products, 16 Jan. 1998, WT/DS26/AB/R, at para. 123.

²⁴⁰ Charnovitz, "Pelly Amendment", at 796.

necessity condition seems fairly difficult to be changed. In sum, the less-restrictive-test could continue to obstruct the justification of a Pelly trade sanction under Article XX (b) unless the WTO resolves to modify the dominant rule. Therefore, whenever the US invokes an exceptional clause, Article XX (b) probably would stay in an alternative position. Nonetheless, since the previous legal opinions on the requirements of Article XX (g) have been modified by the recent judgements, the future interpretation of the necessity element operating to defer to the Pelly type sanctions cannot be ruled out.

(c) The chapeau's standards of Article XX

In the light of the above analysis, arguably, the Pelly measure was barely able to satisfy the terms of either Article XX (b) or (g). However, for the sake of discussion, it might be interesting to examine whether the measure could be justified under the conditions specified in the chapeau, if, hypothetically, the Pelly sanctions would have fallen within the ambit of those exceptional clauses.

(i) Were the Pelly sanctions a product of unjustifiable discrimination?

The decision on whether the imposition of the Pelly sanctions against Taiwan amounted to unjustifiable discrimination primarily relies on whether the relevant facts demonstrated that Taiwan was treated fairly and justly, as the trade embargo was applied.

First of all, compared with other producing countries of rhinos or tigers, Taiwan may claim that its conduct, even lacking sufficient progress on the control of illegal trade in rhinos and tigers, had not contributed to the direct decrease of the population of those endangered species. Actually, a number of countries which contain rhinos and tigers, such as Zambia and Russia, were urged by the CITES Standing Committee to take further conservation actions. Taiwan thus may contend that those producer nations should undertake a relatively heavier responsibility to deter the diminishing of those species because they expediently control those animals. Instead of pressuring those countries, the US merely selected a consumer country, Taiwan, as the target, and thus simply overlooked the fact that there were other nations probably better meriting the punishment. Secondly, Taiwan can point out that the US only decided to sanction it, even though other consumer nations, like China, initially had been certified under the Pelly Amendment. The sanctions therefore prejudice Taiwan

because the evidence showed that the progress made by China was no better than that of Taiwan.²⁴¹

Moreover, inspired by the *Shrimp* judgement, Taiwan may argue that the US failed to pay adequate regard to the particular situation of Taiwan. Clearly, due to the political reasons, Taiwan has been unable to become a party to CITES,²⁴² and thus has been constantly barred from enjoying the privileges as those CITES members, such as scientific and technical assistance²⁴³ regarding the preservation of rhinos and tigers. Thus, Taiwan should be given more time to adjust its policy to the extent that compatible with the current conservation trend. Unfortunately, no favourable treatment was given to this country. While other CITES members that had been requested to improve their conservative measures were not sanctioned, it appeared unjustifiable for the US to only sanction a non-member of CITES, which technically violated no rules of CITES.²⁴⁴

The US may justify its selection of Taiwan as a final target by claiming that its decision was made to honour the decisions and recommendations of the Standing Committee, which treated Taiwan differently from other nations. At its 30th meeting, the Standing Committee did recommend that Parties consider implementing an import ban against wildlife products from Taiwan and China. Further, the US may highlight that, in contrast to other consumer States, such as South Korea and China, Taiwan was particularly singled out for failure to meet the minimum requirements at the 31st meeting of the Standing Committee. Accordingly, the US may argue that its Pelly sanctions did not amount to unjustifiable discrimination.

Taiwan may not dispute this CITES context. But, it may claim that the differential judgement made by the Standing Committee on the PRC and Taiwan to some extent was a reflection of the unequal political positions of these two entities. The PRC, a member of CITES, is in a better position to exert influence over the CITES members and the CITES Standing Committee. In contrast to the PRC, Taiwan served merely as an observer with a status equivalent to that of NGOs.²⁴⁵ Thus, it had

²⁴¹ See chapter one of the thesis.

²⁴² See chapter two of the thesis.

²⁴³ CITES, Art. XII, para. 2 (c). See also chapter five of the thesis.

²⁴⁴ *Id.*

²⁴⁵ See Yeh, "Country/Region Reports: Taiwan", at 440. See. The status of NGOs in international environmental regimes see generally Birnie and Boyle, *International Law and the Environment*, at 86-87; P. Sands, "The Environment, Community and International Law", at 393-94, 396-401, 412-17; Burhenne, "The Role of NGOs", at 207-11.

the right to participate in the sessions but not to vote.²⁴⁶ As observed, it was deprived of an effective access to defending its interests and presenting its progress regarding the preservation of rhinos and tigers in CITES's meetings.²⁴⁷

Whether the US's trade embargo constituted unjustifiable discrimination arguably depends on how the WTO tribunal assesses the validity of the CITES Standing Committee decisions. In short, the WTO might favour the US's position if it fully respects such decisions. Otherwise, if the WTO is sympathetic to Taiwan's position and make its own decision independently of the CITES's judgement, a different finding could be made.

(ii) Did the Pelly sanctions constitute arbitrary discrimination?

Inspired by the *Shrimp* judgement on the interpretation of "non-arbitrary discrimination," in this dispute, the tribunal ought to determine mainly whether the process of applying the Pelly sanctions was in conformity with the principle of due process of law.

In reviewing the US's certification process against China and Taiwan, Taiwan may complain that the procedure fell short of transparency and due process. The decision was made exclusively by the officials in the US Fish and Wildlife Service without allowing either certified country to defend themselves. Further, the Pelly Amendment does not prescribe the procedure of review or appeal for the certified countries. In this regard, Taiwan as well as China may contend that they were discriminated against those countries that were not under certification. Moreover, the law also failed to provide Taiwan any mechanism by which it was able to make a petition to the decision of sanction. Also, Taiwan may contend that it was discriminated against compared to China, which was free from sanctions.

Therefore, Taiwan could remind the tribunal that the Pelly Amendment's denial of any opportunity for certified or targeted countries to be heard or to participate in the procedure of sanction, like the Section 609 authorising the shrimp embargo, underlines its nature of arbitrary discrimination.

Overall, the exclusivity and the inherent arbitrariness rooted in the US Pelly Amendment would not enable the Pelly sanctions to have a favorable chance to stand

²⁴⁶ CITES, Art. XI (7).

²⁴⁷ See Shih, "Multilateralism", at 122. See also Birnie and Boyle, *International Law and the Environment*, at 87.

the test of the non-arbitrary discrimination requirement.

(iii) Were the Pelly sanctions a disguised trade restriction?

Taiwan cannot credibly claim that the Pelly sanctions qualified as a "disguised trade restriction." The legislative history of the Pelly Amendment, as observed, discloses no motivation to protect American domestic commercial interests.²⁴⁸ Also, there seems no evidence to suggest that the Pelly trade embargo was aimed at protecting the domestic industry of US's wildlife.

Conclusion

It seems hard to decide the consistency of the Pelly action against Taiwan with the WTO/GATT rules partly due to the fact that no such dispute has ever been brought to this institution. Nonetheless, by hypothetically examining such case, it has been demonstrated that, under the current WTO jurisprudence, the Pelly action has some difficulty to be justified.

It is evident that the WTO has already begun to show its tolerance for a PPM method after a long-term dismissal of such measures. Although the Pelly sanctions

²⁴⁸ Charnovitz, "Pelly Amendment", at 792.

were launched with the lofty goal of saving the endangered species facing extinction, there remain some hurdles to block the justification of the Pelly sanction under the WTO/GATT mandates. For instance, the absence of a linkage between embargoed products (bird feather) and natural resources to be conserved (rhinos and tigers) as that of the PPM method perhaps would, at least presently, dissuade the tribunal from justifying the action under Article XX (g). Moreover, because there is no sign that the conventional formula regarding the "necessity" requirement in Article XX (b) would be likely to be altered, any use of Pelly sanctions thus has even less chance to qualify under this exception.

Even if the Pelly sanction could be justified under either exceptional clause, it could meet even greater difficulty to survive the test of the chapeau's conditions. It should be noted that the shrimp embargo was not vindicated under the chapeau, even though it did satisfy Article XX (g). That decision implied that the tribunal tended to interpret the introductory note as strictly as possible. The study of the Pelly sanctions against Taiwan shows that, if a number of countries were deemed to be in violation of international environmental agreements, the selection of only one country as a target would be likely to constitute unjustifiable discrimination. Nevertheless, Taiwan may find it difficult to claim successfully that the Pelly sanctions constituted unjustifiable discrimination, if the WTO tribunal chooses to honour the decision made by the CITES Standing Committee, which singled out Taiwan and particularly blamed it for its insufficient progress. Otherwise, a different decision could be made, if the WTO is more sympathetic to Taiwan's position. On the other hand, the fact that the Pelly Amendment inherently operates without adequate due process of law could make any action authorised by the law, such as the case of Taiwan, constitute arbitrary discrimination.

As indicated, some inherent characteristics of a Pelly action prevent its measures from being justified under the exceptional clause of GATT 1994. The case study of the Taiwan situation in particular, however, indicates that the implementation of a Pelly sanction perhaps could have won some sort of sympathy from the WTO tribunals, if some circumstances had been altered. For instance, the geographic location of natural resources is one of the factors used to determine whether the measures qualify Article XX (g). A Pelly sanction may have a better chance of meeting the requirement of the exceptional clause if it is aimed at preserving endangered marine species, like whales, dolphins or sea turtles, rather than the land-

based species. In effect, the US may rightly claim the existence of a sufficient nexus between the species and itself on the ground that those marine species are not subjected to a specified national jurisdiction, and the US may exercise jurisdiction over them. Further, on the selection of a target, if the sanctions were taken entirely to follow a non-discriminatory judgement of an international environmental regime, the US would find it easier to establish that the sanctions did not amount to unjustifiable discrimination.

Bilateral Treaty—FCN Treaties

The significance of FCN treaties to the development of the US commercial relations with other nations cannot be over-emphasised. During the formative years of the US, the treaty “occupied a central foreign policy, [serving] both as a symbol of peaceful relations and a protector of vital commercial interests.”²⁴⁹ Then, greater emphasis was placed on the establishment and promotion of private foreign investment, as opposed to trade and shipping. The switch appears, as observed, “a direct reflection of the increased foreign investment role of American business firms after World War II.”²⁵⁰

The FCN treaties do contain a variety of functions, mainly facilitating the mutual commercial activities between the US and its trading partners.²⁵¹ In spite of their various commercial purposes, the trade provisions specified in the treaty appear the most relevant applicable rules to the present study involved with the use of imports ban authorised by the US Pelly Amendment. It is admitted that, after World War II, the trade promotion aspects of the treaty had largely been replaced by the WTO/GATT which becomes the central forum for negotiating tariff adjustment and promoting trade objectives. Nevertheless, for Taiwan, currently a non-member of the WTO, the treaty remains a feasible tool to challenge the Pelly sanctions.

A The rules of the FCN Treaties

1 Basic applicable provisions

A common provision of FCN treaties, based upon the principle of reciprocity, is to require each contracting party to grant equal national treatment to citizens and companies of the other contracting State in its territory as well as to provide them with legal protection against non-commercial risks.²⁵²

Moreover, these treaties also institute the most-favoured-nation treatment that forbids discriminatory measures between contracting parties and any third country. In

²⁴⁹ Youngquist, “United States Commercial Treaties”, at 72.

²⁵⁰ *Id.*

²⁵¹ Apart from trade, the FCN treaties normally cover the following matters: (a) rights of entry for business and residence; (b) protection of individuals and companies; (c) rights and privileges of individuals and companies with respect to: (1) practice of professions; (2) acquisition of property; (3) patents; (4) taxes; (5) remittance of earning and capital; (6) competition of state-owned enterprises; (7) expropriation or nationalization; (8) access to courts; (d) shipping; and (f) referral of disputes under the treaty to the International Court of Justice. *See* Youngquist, *id.*

terms of the applicable rules to the restrictions on the import or export of the like product, this requirement appears the most relevant one. In effect, FCN treaties generally prohibit the imposition of import or export control on any like article by either party unless the same measures are applied to all third countries. For instance, the FCN treaty between the US and the ROC (Taiwan) provides:

No prohibition or restriction of any kind shall be imposed by either High Contracting Party on the importation, sale, distribution or use of any article the growth, produce or manufacture of the other High Contracting, or on the exporting of any article destined for the territories of the other High Contracting Party, unless the importation, sale, distribution or use of the like article the growth, produce or manufacture of all third countries, or the exportation of the like article to all third countries, respectively, is similarly prohibited or restricted.²⁵³

As a result, the non-discriminatory treatment will effectively render a unilateral trade embargo against certain parties inconsistent with the treaty obligation.²⁵⁴ It is because all countries with whom an acting State has a commercial relationship scarcely would have to be placed under the same trade ban while a decision of taking sanctions against a particular country was made. The trade measure thus arguably could be challenged successfully under the treaty obligation.

During the past few decades, the 1986 *Nicaragua* case²⁵⁵ proved to be the most renowned judgement dealing with this issue. The focal point was whether the US's act of interrupting the entire commercial and trade relationship with Nicaragua was in contradiction of the FCN treaty. Nicaragua claimed a breach of the FCN obligations by the trade embargo, not based on a specific provision of the treaty, but the general object and purpose of the treaty.²⁵⁶ The ICJ admitted the sovereign right of a nation to conduct trade affairs in the absence of a treaty commitment, or other specific legal obligation.²⁵⁷ It, however, found that the US comprehensive trade embargo undermined the whole spirit of the treaty against Nicaragua. The Court ruled:

²⁵² See Jackson, "Congruence or Conflict", at 1236.

²⁵³ The FCN treaty between the US and the ROC, Art. 16(3). Similar provision can be found in other FCN treaties, like Art. 14(2) in the FCN treaty between the US and Nicaragua, 9 U.S.T. 449, T.I.A.S. 1871 (1956); Art. 14 (2) in the FCN treaty between the US and Pakistan, 12 U.S.T. 110, T.I.A.S. 4683 (1961).

²⁵⁴ See Muir, "Boycott", at 200.

²⁵⁵ Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.A.), I.C.J. Rep. 1986, at 138 [hereinafter *Nicaragua* Case].

²⁵⁶ *Id.* at 135

[w]here there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty.²⁵⁸

But, Judge Oda, in his dissenting opinion, disagreed the Court's application of the concept of the object and/or purpose of a treaty to the assessment of US trade embargo on the ground that the undermining of the object and /or purpose of a treaty itself would not be tantamount to a violation of the treaty obligations.²⁵⁹

Another significant provision of the FCN treaties that may be relevant to a trade embargo requires the "freedom of commerce and navigation between the territories of either party."²⁶⁰ Further, it provides:

The vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and water of such other Party open to foreign commerce and navigation.²⁶¹

Apart from the interruption of commercial relations with Nicaragua, the US also prohibited Nicaraguan vessels from entering into US ports. The World Court accordingly decided that the embargo constituted a measure contrary to that article.²⁶² A question may be raised as to whether a mere trade ban without imposing a simultaneous navigation embargo might be violative of such clause, which will be discussed later.

2 Exemption of the treaty obligations

(a) Termination of the treaty

Some trade measures invoked by either party against the other may be exempted from being bound by the treaty obligations, if the action fulfils specified

²⁵⁷ *Id.* at 138.

²⁵⁸ *Id.* On the other hand, the Court decided that other economic pressure imposed by the US against Nicaragua did not defeat the object and purpose of the treaty, such as the 90 per cent cut in the sugar import quota, the cessation of economic aid, the opposition to the grant of loans. *See Id.*

²⁵⁹ Oda, dissenting opinion, *id.* at 249-51.

²⁶⁰ *See* Art. 19 (1) of the FCN treaty between the US and Nicaragua. *See also* Art. 21 (1) of the FCN treaty between the US and the ROC.

²⁶¹ Art. 19 (3) of the FCN treaty between the US and Nicaragua. *See also* Art. 21 (3) of the FCN treaty between the US and the ROC.

²⁶² *Nicaragua case*, at 140, para. 279.

requirements. Firstly, some FCN treaties provide for a right of termination by either party.²⁶³ Normally, the termination of a treaty will release the parties from any obligation further to perform the treaty.²⁶⁴ Nevertheless, to enable merchants of either party to accommodate the change of circumstance, the FCN treaty shall remain in force until certain period of time from the date on which a notice of intention to terminate shall have been given has expired. Usually, it requires one year for such termination to take effect. For instance, the FCN treaty between the US and the ROC (Taiwan) specifies:

Unless one year before the expiration of the aforesaid period of five years the Government of either other High Contracting Party shall have given notice to the Government of the other High Contracting Party of intention to terminate this Treaty upon the expiration of the aforesaid period, the Treaty shall continue in force thereafter until one year from the date on which notice of intention to terminate it shall have been given by either High Contracting Party.²⁶⁵

In practice, to reach the goal of using trade sanctions effectively, once the acting party has decided to terminate the bilateral commercial relations, often it does not hold the action until the treaty officially ends. For instance, the US trade sanctions against Nicaragua were implemented on the 6th of May, 1985, five days after notifying Nicaragua of the US's intention to abrogate the FCN treaty.²⁶⁶ It was indisputable that the treaty would still govern the embargo. The World Court, thus, correctly decided that the US remained bound by the treaty obligations because the treaty had not been officially terminated, despite the US's notice of termination.²⁶⁷

(b) Exceptional clauses

Even without being terminated, FCN treaties generally provide certain exceptional clauses that probably constitute a plausible legal ground on which trade restrictions could be justified. The arrangement generally covers policy goals such as national security and humanitarian and environmental concern.²⁶⁸ In practice, the national security exception is often employed to justify the measures. When the

²⁶³ Article 54 (a) of the Vienna Convention on the Law of Treaties provides: The termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty.

²⁶⁴ The Vienna Convention on the Law of Treaties, Art. 70 (1) (a).

²⁶⁵ FCN treaty between the US and the ROC, Art. 30(3).

²⁶⁶ See US Exec. Order No. 12,513, 50 Fed. Reg. 18, 629 (1985).

²⁶⁷ *Nicaragua case*, at 140, para. 279.

²⁶⁸ See FCN Treaty between USA and ROC, Art. 26(1)(a)(b)(c) (d); (2)(a)(b)(c)(d).

contracting parties come into a hostility that may prove to endanger the interests of either party, the provision is quite likely to be applicable to the critical situation. In contrast, if no evidence indicates that the continuance of trade intercourse will damage the security of either party, hardly can the trade embargo be justified under the circumstance. In the *Nicaragua* case, the US invokes the security clause to justify the trade embargo against Nicaragua. The ICJ denies such claim on the ground that:

Since no evidence at all is available to show how Nicaragua policies had in fact become a threat to "essential security interests" in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was "necessary" to protect those interests. Accordingly, Article XXI affords no defence for the United States in respect of any of actions here under consideration.²⁶⁹

As far as this study is concerned, environmental and health exceptions are the most relevant. In the FCN treaty between the US and the ROC, each contracting party is allowed to impose an environmental trade embargo in violation of fundamental obligations of the FCN treaties if the measure meets the following requirement:

Subject to the requirement that, under like circumstances and conditions, there shall be no *arbitrary discrimination* by either High Contracting Party against the other High Contracting Party or against the nationals, corporations, associations, vessels or commerce thereof, in favor of any third country or the nationals, corporations, associations, vessels or commerce thereof, the provisions of this Treaty shall not extend to prohibitions or restrictions:

...

(b) *designed to protect human, animal, or plant life or health;*²⁷⁰

...

The structure of the provision is quite similar to that of the GATT general exceptional clause. So, the eventual justification of an environmental trade measure under the FCN treaty must satisfy the criteria embodied in the introductory note and individual exception as well. Yet, in spite of the structural similarity, obviously, the content of the article in these two regimes remains different.

Where the topic of the conservation of natural resources has not been included,

²⁶⁹ See *Nicaragua* case, at 141, para. 282.

the environmental exception of the Article merely covers the protection of living things. Further, in contrast to the necessity requirement in Article XX (b) of GATT 1994, the FCN treaty simply requires "designed to" rather than "necessity" or "relating to" for the linkage between the measure imposed and the policy goal. According to its plain meaning, the term can be read as "intended for certain purpose."²⁷¹ Although the term may not have been authoritatively interpreted, the device, compared with the GATT context, could effectively relieve the burden of the party claiming the justification of the restrictions. The measure that is inconsistent with the basic FCN principle therefore may have a better chance to survive the test of the environmental exception as long as it fulfills the designed purpose. Nonetheless, like Article XX (b) of GATT 1994, the issue of whether the measure under the FCN treaty may be permitted to protect extraterritorial living things could be controversial.

Moreover, unlike GATT 1994, the opening paragraph of the exceptional clause appears in a relatively simpler form. The headnote does not spell out many elements, but only prohibits "arbitrary discrimination." Given the lack of an adequate interpretation of the "arbitrary discrimination", it remains to be seen whether, in the future, an international tribunal would tend to adopt identical criteria to that of the WTO jurisprudence, which was largely confined to the sphere of "due process of law."

B The assessment of the consistency of the Pelly sanctions with the FCN treaty

1 The continuation in force of the FCN treaty between the US and the ROC (Taiwan)

In 1946, the Sino-US FCN treaties was concluded as a legal basis for the mutual intercourse of commerce and navigation between the two countries. The treaty is "designed to promote friendly intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the people".²⁷² In 1978, the US President Carter decided to recognise the government of the People's Republic China as the sole legal government of China and accordingly terminated foreign relations with the Republic of China (Taiwan). In spite of the termination of diplomatic relations between US and the ROC, it is

²⁷⁰ FCN treaty between the US and the ROC, Art. 26 (2) (b) [emphasis added].

²⁷¹ Collins Cobuild, *English Dictionary*, at 445; The term has been defined as "contrived or taken to be employed for a particular purpose." See *Black Law Dictionary*, at 447.

interesting to note that neither of them intended to discontinue the treaties and agreements binding them except the defense treaty. The US President's Memorandum stated that:

Existing international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and agencies beginning January 1, 1979, in accordance with their terms and, as appropriate, through that instrumentality.²⁷³

Further, the Taiwan Relations Act (TRA)²⁷⁴ passed by Congress explicitly reiterated the US's resolution, stressing that:

the absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan . . . in the [same] manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.²⁷⁵

More specifically, the TRA requires

the continuation in force of all treaties and other international agreements . . . entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.²⁷⁶

Similarly, shortly after the promulgation of the TRA, the ROC government announced a statement affirming the consensus.²⁷⁷

In terms of the FCN treaty, substantial evidence indicated the intention of parties to continue to fulfill the treaty obligations. Following the President's Memorandum, the US State Department has listed such FCN treaty annually in "Treaties in Force" which has been honoured by the US since 1979. Furthermore, the Report on the TRA of the House of Representatives expressly declared that "[T]he US-ROC Treaty of

²⁷² See the preamble of the FCN Treaty between the US and the ROC.

²⁷³ President's Memorandum for All Departments and Agencies: Relations with the People on Taiwan, repinted in 1979 US Code Cong. & Admin. News 75.

²⁷⁴ Pub. L. No. 94-83, 10 Apr. 1979, 22 U.S.C. 3300 *et seq.*

²⁷⁵ 22 U.S.C. 3303 (a).

²⁷⁶ 22 U.S.C. 3303 (c).

²⁷⁷ See Letter from the Ministry of Foreign Affairs to the Ministry of Justice, Ministry of Foreign Affairs, North America I, No. 06514, 13 Apr. 1979.

Friendship, Commerce and Navigation, which provides a legal foundation for commercial relations between the United States and Taiwan, will continue without interruption.”²⁷⁸

Apart from the overwhelming evidence of both Executive and Legislative Branches’ intent to give full effect to the FCN Treaty, in particular, the judicial decisions by both parties have all confirmed that the treaty remains valid and enforceable.²⁷⁹ For example, in the *Chinese TV Program* case, a dispute arises regarding whether a TV program authored by Taiwanese citizens can enjoy copyright protection in the US. Section 104(b)(1) of the US Copyright Act makes an original work eligible for copyright protection if

On the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party.²⁸⁰

Clearly, the FCN treaty between the US and the ROC empowers each party to grant copyright protection to works authored by citizens of them.²⁸¹

But, defendants contend that the treaty lapsed in 1979 when the US de-recognised Taiwan. In short, the core issue of the dispute is whether the FCN treaty remains valid, irrespective of the existence of diplomatic relations. The court recognises that “on the question whether [a] treaty has even been terminated, *governmental action* in respect to it must be regarded as of controlling importance.”²⁸² Further, it concedes that the judiciary should refrain from determining whether a treaty has lapsed, and instead should defer to the wishes of the elected branches of government.²⁸³ Given the fact that both Congress and the Executive Branch agree that the FCN treaty is to continue in effect, the court holds that the treaty remains a valid

²⁷⁸ H.R. Rep. No. 26, 96th Cong., 1st Sess. 10-11 (1979).

²⁷⁹ See *New York Chinese TV Programs, INC. Vs U.E. Enterprises, INC.*, 954 F.2d 847 (2nd Cir. 1992)[hereinafter *Chinese TV Programs case*]; *American Encyclopedia Britannica, INC. Vs Tan Ch'ing Publishing Co., Ltd.*, Civil Judgement of the Taiwan High Court, 79[1990]-shang-keng-I-tzu no. 128.

²⁸⁰ 17 U.S.C. 104(b)(1).

²⁸¹ Article IX of the FCN treaty requires both parties to guarantee the privileges of their own laws to citizens of the other nation

in regard to copyrights, patents, trademarks, trade names, and other literary, artistic and industrial property, upon compliance with the applicable laws and regulations, if any, respecting registration and other formalities which are or may hereafter be enforced by the duly constituted authorities . . .

²⁸² *Terlinden v. Ames*, 184 U.S. 270, 285 (1902) [emphasis added].

²⁸³ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

and enforceable treaty.

However, on the other hand, the defendants further question the constitutionality of continuing to honour the FCN treaty by US governmental action. Firstly, because a treaty is a contract between nations, they argue that the US's de-recognition of Taiwan implies that Taiwan is no longer a 'nation', and, thus, any treaties between them become void. The court refutes the argument on the ground that it confuses two distinct concepts: nationhood and diplomatic recognition. It considers that an entity's status as a nation is not affected by whether it receives diplomatic recognition from other nations. Because Taiwan remains a nation, the court rules that the US may continue to honor its treaties with Taiwan. Moreover, the court denies the linkage between diplomatic recognition and the validity of a treaty by highlighting the cases where several nations have treaties with the US despite the absence of diplomatic relations.²⁸⁴

Secondly, defendants pointed out that the TRA has unconstitutionally amended the FCN treaty. The treaty was signed by the 'Republic of China'. It is true that the TRA changes the name of the party into the 'governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979'.²⁸⁵ Thus, because the TRA, a domestic legislation, was not enacted pursuant to the Treaty Clause of the Constitution, defendants argue that the TRA constitutes an unconstitutional amendment to the FCN treaty. The court, however, considers that such change of name is simply to recognise the realities of a changed political landscape and, thus, is not an amendment to that treaty, which should involve the modification of substance of the treaty. In sum, the actions, the court concludes, of both of these governmental branches to continue to honour the FCN treaty do not violate the US Constitution.

Overall, the validity of the FCN treaty has never been affected by the severance of their foreign relations, and the treaty would remain in force subject only to the termination clause contained in the treaty. As the Pelly sanctions were imposed, the US did not announce the termination of the FCN treaty. Thus, both countries remain bound by the agreement.

²⁸⁴ The court notes that the US does not accord diplomatic recognition to nine nations: Albania, Angola, Cambodia, Taiwan, Cuba, Iran, Libya, Vietnam, and North Korea and, with the exception of Angola and North Korea, each of these nations has at least one treaty with the United States that is currently honoured.

²⁸⁵ 22 U.S.C. 3303(c).

2 What basic rules of the FCN treaty were violated by the US trade sanctions?

Taiwan could assert that the Pelly sanctions were in violation of Article 16(3) of the FCN treaty, which prohibits any discriminatory measures against either party on the importation or exportation of any article. When the ban on imports of certain wildlife products from Taiwan was announced, clearly, no similar measures were extended to other nations that exported the same products to the US. Thus, it seemed quite obvious that the Pelly sanctions were inconsistent with the most-favored-nation mandate concerning restrictions on the importation. The practice of US's sanctioning of Taiwan discloses that any trade measures against a specified contracting party without simultaneously targeting the other nations with the same measures should be regarded as a breach of the requirement of the FCN treaties.

Surely, in contrast to the comprehensive trade embargo imposed by the US against Nicaragua, hardly Taiwan may claim that the Pelly sanctions which only involved certain imports ban on wildlife product undermined the general object and purpose of the FCN treaty.

Moreover, it is interesting to explore whether the Pelly sanctions that only prohibited the importation of certain wildlife products might be in contravention of Article 21(1) specifying "freedom of commerce and Navigation." First, it should be determined whether the rule is applicable to a pure imports ban without prohibition on the entry of vessels from either party. The US could argue that the treaty language of Article 21 (1) should be read altogether to extent that the provision is literally confined to navigation activities.²⁸⁶ In addition, the context of paragraphs 2 and 3 of the article that only refers to the aspects of vessels' activities further confirms the finding. By contrast, favouring an extensive interpretation of the article, Taiwan may claim that a pure import ban is still covered by the provision because the ban by nature may impede the freedom of commerce regardless of their quality or quantity.

If a court was inclined to recognise the applicability of the provision to an import ban, the US might nevertheless claim that the relatively moderate import ban against Taiwan would not actually obstruct the alleged "freedom" of commercial relations between the two countries. It may highlight the differential impact between a general trade embargo and a trade ban on selective products. It seems evident that, unlike a comprehensive termination of commercial intercourse that apparently would encroach

²⁸⁶ *E.g.* Judge Oda, in the *Nicaragua* case, remarked that article "is exclusively devoted to matters of maritime commerce." Oda, dissenting opinion, *Nicaragua* case, at 251, para. 84.

on the freedom of commerce, the Pelly imports ban merely accounted for a relatively small amount of Taiwan's total exports to the US.²⁸⁷ As a result, the US may further contend that the trade embargo was unable significantly to affect the free commerce between the two countries since most of the bilateral trade relationship remained intact. Overall, given the lack of substantial elaboration on the provision, the legality of the Pelly trade embargo against Taiwan under the provision remains controversial.

3 Whether the Pelly sanctions could be justified under the FCN environmental exceptional clause?

It is beyond doubt that the Pelly trade sanctions were imposed to signal the US's serious concern about the life of the endangered rhinos and tigers. Taiwan would find it difficult to deny that the wild life product embargo was not "designed to" reach the goal of protecting those species. But, it still may argue that the exception does not allow each party to use trade measures to save species located outside the national jurisdiction of the parties. If the WTO decision in the *Shrimp* case were to be followed, the US would have to prove that there is a substantial nexus between itself and the natural resources in question. It is uncertain whether the US's claim that the preservation of endangered species representing community interests is sufficient for such a nexus will be accepted. On the other hand, Taiwan may point out that, unlike the WTO/GATT governing multilateral trade relations, a FCN treaty operates bilaterally and is concerned with the mutual interests of the parties. Thus, it appears beyond the mandate of the agreement to allow any contracting party to invoke trade restrictions in an attempt to protect species which are located out of the boundaries of each parties, such as African rhinos and Indian tigers. The US may argue, in response, that such a treaty would be much more likely to allow for US approaches to the use of trade sanctions than the multilateral regime, especially when the former precedes the latter in time.

If the dispute were submitted to the ICJ, surely the geographic limitation regarding the exceptional clause would be a focus. It is uncertain whether the World Court would rely on the approach adopted by the decision of the WTO or formulate a new standard. Nevertheless, if it interprets the function of the treaty restrictively, it perhaps would favour the position of Taiwan. Otherwise, if it were more willing to

²⁸⁷ It should be noted that the trade ban pursuant to the Pelly Amendment may operate to a full imports ban subject to the President's discretion. See 22 U.S.C. 1978 (a) (4).

defer to the global environmental concern, the WTO's formula could be its useful reference.

Even if the Pelly sanctions do fall within the environmental exception, they must also meet the requirement specified in the headnote of the provision. If the tribunal accepts the interpretation and application of the standard of 'arbitrary discrimination' released in the *Shrimp* case, it may accordingly decide that the Pelly sanctions were 'arbitrary discrimination' because of the finding that the imposition of the measure did fall short of the due process of law.

Alternatively, the tribunal may simply turn to the plain meaning of the term, which seemingly refers to a measure taken willfully and unreasonably.²⁸⁸ The arbitrariness of the discrimination is likely to become visible, especially on the selection of a target, while plenty of other countries were also guilty of the alleged misbehavior.²⁸⁹ It is recalled that both China and Taiwan were certified by the US Secretary of the Interior at the same time for illegal trade in rhino and tiger parts.²⁹⁰ Surprisingly, Taiwan was solely targeted by the sanctions. Taiwan persistently considered the decision of selective targeting unfair and unjust because it was convinced that, under a similar situation, China should deserve equal treatment if the US insisted on the implementation of such coercive sanctions. Accordingly, Taiwan would claim the illegality of the Pelly action on the basis that it was driven by arbitrary discrimination.

On the other hand, the US is likely to defend the non-arbitrary discrimination of the Pelly sanctions by citing the resolutions of the CITES Standing Committee, which evaluated the progress of each respective nation differently. In short, a competent tribunal, such as the ICJ, may be expected to look at the overall context of relevant decisions of the CITES Standing Committee in determining whether the Pelly sanctions constituted arbitrary discrimination. In line with the previous discussion in the WTO regime, the tribunal might be in favour of US's position, if it simply accepted the CITES's differential judgement on Taiwan and China's progress. On the other hand, if the tribunal, adopting the WTO's jurisprudence, chose to consider the concept of arbitrary discrimination in the framework of 'due process of law', the US's Pelly action would perhaps be regarded inconsistent with the FCN treaty's

²⁸⁸ See *Black's Law Dictionary*, at 104-5.

²⁸⁹ See Charnovitz, "Pelly Amendment", at 792.

²⁹⁰ Letter from the Secretary of the Interior to the President, Sep. 7, 1993.

exceptional clause.

Conclusion

With the advent of the WTO / GATT multilateral regime, the influence of FCN treaties has been declining.²⁹¹ The treaties, however, do limit either contracting party's discretion on conducting trade affairs to a degree consistent with the non-discriminatory principle. The bilateral commercial agreement thus may serve as a feasible and useful instrument under which a trade embargo could be challenged successfully. For Taiwan, nonetheless, it is quite likely to secure the relief and remedy offered by the bilateral treaty.

Under the general circumstance, a Pelly trade embargo imposed against any parties with whom the US concluded the FCN treaties would normally violate the most-favoured-nation requirement of the treaty. It is uncertain, however, in the Taiwan case, whether the Pelly sanctions, triggered by the concern about wildlife protection, could be justified under the exceptional clause of environmental consideration. Overall, the legality of the Pelly sanctions under the FCN treaties largely depends on whether the actions would be regarded as an arbitrarily discriminatory action. Compared with its fate under the environmental exception of GATT 1994, the Pelly sanctions against Taiwan had a better chance to meet the requirement of the FCN treaty. The difficulty for the US to persuade a tribunal that the decision to sanction Taiwan does not amount to "arbitrary discrimination" required by the introductory note, however, remains.

Also, it is true that the shortage of useful precedents on similar cases increases the difficulty of conducting such an assessment. Given the similarity in the structure of environmental exceptions between the FCN treaties and GATT 1994, the relevant WTO jurisprudence may provide some reference for the interpretation of the FCN treaties' language. But, the competent dispute settlement body of the treaty regime, the ICJ, could retain the discretion in formulating its own criteria without being bound by the WTO ruling.

²⁹¹ See Jackson, *World Trading System*, at 34.

Chapter 5

The Impact of International Environmental Law

Introduction

There appears to be no inherent conflict between international environment law and unilateral environmental measures owing to their common aim of deterring the degradation of the human environment. People favouring unilateral environmental sanctions may regard such measures as an effective tool to enforce environmental standards. The necessity to invoke unilateral actions may be significantly contemplated, particularly while no international enforcement regimes are available or workable. It is premature, however, to suggest that these environmental measures be deemed legal simply because of their righteous motivation. As multilateral approaches are increasingly of value in dealing with environmental challenges, the global trend against unilateral trade measures taken for pursuing environmental purposes has been intensified mainly as a result of the initiation and advocate of trade regimes. Their efforts eventually led to the conclusion of the principle featuring "trade and environment" at the 1992 United Nations Conference on Environment and Development (UNCED).¹ More importantly, despite its soft-law character, the principle that multilateral initiatives are to be preferred to unilateral ones has been explicitly and substantially referred to the *Shrimp/Turtle* case in the World Trade Organization (WTO). Predictably, the role of the principle could become increasingly important so long as the unilateral use of such measures remains and its legal status might be further illuminated by subsequent judicial decisions.

This chapter seeks to explore how the current international law of the environment addresses unilateral environmental measures. The focal point is on analysis of Principle 12 of the Rio Declaration of UNCED, which constitutes both a general and primary rule governing the issue. In actuality, a substantial body of documents and practices emerging before and after the enunciation of the principle has endorsed the universal nature of the preference for multilateral over unilateral action. The chapter first discloses the relevant developments that have contributed to

¹ Adopted 14 June 1992, at the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF. 151/5Rev.1[hereinafter Rio Declaration].

the formulation of the principle. The implications embodied in the 1991 GATT *Tuna/Dolphin* case and the relevant GATT documents arguably herald the direction. Thereafter, the legal content of the Rio Principle, and other instruments adopted at UNCED containing identical elements will be examined. Further, subsequent developments concerning the principle are analysed in order to prove its validity as new disputes arise.

Finally, the chapter will proceed to explore whether the US's Pelly action against Taiwan is consistent with the Rio Principle. It should be borne in mind that the main focus of the study is whether the trade sanctions which presumably followed the CITES's recommendation may secure an international consensus.

A The formulation and implication of Principle 12 of the Rio Declaration on Environment and Development

1 Pre-Rio development

(a) Environmental aspects of the 1991 GATT Tuna/Dolphin case

Unilateral trade measures invoked to pursue the change of environmental practice of other nations did not attract earnest international concern until the recent decade. The most noted dispute arose from the US's tuna imports restriction imposed against Mexico in the early of 1990s for the latter's tuna fishing practice considered incompatible with US standards for the reduction of incidental dolphin mortality.² The dispute settlement panel of the General Agreement on Tariffs and Trade (GATT) was given an excellent opportunity to judge the conduct of unilateral enforcement of environmental standards. The GATT Panel seemingly not only dealt with the consistency of the trade embargo with the US's obligation toward the GATT provisions,³ but also, extraordinarily, displayed its deep concern and even opposition to unilateral trade measures authorised not by international consensus but by national legislation.

In this dispute, basically, the Panel classified the environmental trade embargo as following:

(i) An ecological embargo

Since it is not uncommon that fish resources and dolphins are found together around the sea areas,⁴ certain fishing practice will accordingly lead to the incidental taking of dolphins. In the Eastern Tropical Pacific Ocean (EPT),⁵ a particular association between dolphins and tuna has become a unique situation.⁶ Many countries in this area, including Mexico, have harvested tuna with purse-seine nets⁷ in

² It has been estimated that the US's environmental trade measure "was the twenty-third time that the United States had embargoed imports of tuna, starting with Spain in 1975." See United States Restrictions on Imports of Tuna, 3 Sep. 1991, the Panel Report, DS 21/R, not adopted, para. 4.15. [hereinafter *Tuna I*].

³ See chapter four of the thesis.

⁴ See S. P. Northridge, "World Review of Interactions between marine mammals and Fisheries", consultant report published as FAO fisheries Technical paper No 251 Supplement 1, FIRM/T251 (Suppl. 1), Food and Agriculture Organization of the United Nations (Rome, 1991).

⁵ The US law defines the EPT as the area of Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the coasts of North, Central and South America. See Title 50, Code of Federal Regulations (CFR) 216.3 (1990).

⁶ The GATT Panel noted that "This type of association has not been observed in other areas of the world." *Tuna I*, at para. 2.2.

⁷ As observed by the Panel: "The last three decades have seen the deployment of tuna fishing

which dolphins are frequently trapped and killed.

To curb incidental dolphins mortality resulting from undesirable tuna-fishing practice, the US's Marine Mammal Protection Act (MMPA)⁸ stipulates requirements by which US domestic fisheries are obliged to abide. In addition, by denying access to the US's market, the MMPA also mandates the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from nations whose tuna-fishing policy in the EPT fail to meet the specific US requirements for dolphin conservation. The eventual imposition of a trade embargo against tuna products from Mexico was a clear indication of the US's intention to seek modification of other countries' environmental policy. Obviously, such market power has been employed as a tool for ecological considerations. Therefore, the US's embargo authorised by the MMPA could be perceived to be primarily aimed at the conservation of dolphins rather than the regulation of tuna products.⁹

(ii) A unilateral action to deal with transboundary environmental problems

The very nature of the US's tuna embargo against Mexico, in many ways, appeared to be a unilateral measure to enforce the US's perspective on dolphin conservation. The most particular feature of the action rests on the standards set by the MMPA with which countries are pressured to comply. Pursuant to the MMPA, the importation of yellowfin tuna and products therefrom harvested in a manner that leads to the incidental killing of dolphins in excess of US standards¹⁰ shall be banned. To access the US's market, the harvesting countries must prove through documentary evidence that the fishing practices meet a series of standards. The legislation requires a dolphin-protecting program that is comparable to that of the US. Thus, such a regulatory regime must include the same prohibitions as are applicable under US

technology based on the "purse-seine" net in many areas of the world. A fishing vessel using this technique locates a school of fish and sends out a motorboat (a "seine skiff") to hold one end of the purse-seine net. The vessel motors around the perimeter of the school of fish, unfurling the net and encircling the fish, and the seine skiff then attaches its end of the net to the fishing vessel. The fishing vessel then purses the net by winching in a cable at the bottom edge of the net, and draws in the top cables of the net to gather its entire contents." *See id.* at para. 2.1.

⁸ The Marine Mammal Protection Act of 1972, P. L. 92-522, 86 Stat. 1027 (1972), as amended, notably by P. L. 100-711, 102 Stat. 4755 (1988) and most recently by P. L. 101-627, at 104 Stat. 4467 (1990); codified in part at 16 U.S.C. 1361ff.

⁹ *Cf.* Japan argued that "[i]t was unlikely that the MMPA embargo could be shown to be "primarily aimed at the conservation of" dolphins because an embargo on all yellowfin tuna and tuna products was not a dolphin conservation measure but a sanctions mechanism to force other countries to adopt policies established unilaterally by the United States." *Tuna I*, at para. 4.19.

¹⁰ MMPA, section 101 (a) (2) (B).

rules to US vessels.¹¹ Also, it demands the average rate of incidental taking of marine mammals for their tuna fleets must not exceed 1.25 times the taking rate of US vessels in the same period.¹² During that period, the US law allows the incidental kill of up to 20,500 dolphins a year by its own fleet.¹³

Although the US insisted that the standards for dolphin conservation be based on "scientific information evaluated using recognized scientific approaches,"¹⁴ there is no widely accepted evidence that may endorse that view.¹⁵ The US measures virtually derive from its own judgement on the methods that are preferable for dolphin protection. Accordingly, it may be concluded that the US implemented its own standards by invoking economic leverage to force nations like Mexico to adopt measures comparable to the US.

Another aspect which underlines the unilateral feature of the US's trade embargo is that the US retains the discretion to determine whether countries have met that standards.¹⁶ It feels free to choose the target being deemed as a violator without international supervision. Thirdly, the penalty to be imposed is subject to US national legislation.¹⁷

Overall, in contrast to other trade measures implemented purely for protecting national interests, the US tuna/dolphin embargo proved a unilateral imposition of an import ban aimed at solving transboundary environmental issue.

(iii) The prevalence of collective methods over unilateral actions for global environmental challenge

In the Panel Report, reflecting the preferences expressed by a number of member States,¹⁸ several rationales emerged to question the appropriateness of the US unilateral embargo against Mexico for dolphin protection. The following arguments

¹¹ *Id.*

¹² *Id.* The US regulations have specified a method of comparing incidental taking rates by calculating the kill per set of the US tuna fleet as an unweighted average, then weighting this figure for each harvesting country based on differences in mortality by type of dolphin and location of sets. See "Regulation Governing the Importation of Tuna Taken in Association with Marine mammals" (interim final rule), 54 Federal Register 9438 (7 March 1989).

¹³ *Tuna I*, at para. 3.37.

¹⁴ *Id.* at para. 3.46.

¹⁵ It had been observed by Japan that "the MMPA standard for incidental dolphin takings was set unilaterally, and was not a scientific standards, . . ." *Id.* at para. 4.18.

¹⁶ See Charnovitz, "Pelly Amendment", at 774.

¹⁷ *Id.*

¹⁸ A number of member States made written submission to the Panel. Most of them disclosed their opposition to the US's unilateral actions, including Canada, European Economic Community (EEC),

presented in the Panel marked this approach:

Firstly, it was advocated that the GATT regime should not tolerate the unilateral imposition of national conservation objectives upon other member States without their consent or participation in the development of the standard.¹⁹ Like the EEC's comment, it had been pointed out:

[t]he EEC did not consider application of unilateral trade restrictions to be an adequate means to limit incidental dolphin mortality, . . . , the EEC would not introduce trade measures because of a third country's requirements nor on the basis of that country's unilaterally-defined standards.²⁰

More radically, the term "eco-imperialism" has been used for describing such national behaviour.²¹ Some countries even worry that:

Potentially, any nation could thereby justify unilaterally imposing its own social, economic or employment standards as a criterion for accepting imports. Any influential contracting party could effectively regulate the internal environment of others simply by erecting trade barriers based on unilateral environmental policies.²²

It is likely that such risk caused by the unilateral judgement on another nation's environmental practice may accelerate especially whilst international consensus to deal with the critical issue has not yet been established. In this case, it is obvious that the GATT is reluctant to bear the consequences of justifying such unilateral environment-oriented measures. If the US's measures were accepted, as the Panel concluded:

[e]ach contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.²³

The GATT's wariness of unilateralism is an indication of its vigorous desire to safeguard the merits of sovereign equality.²⁴ In its concluding remarks, the Panel simply declared: "[a] contracting party may not restrict imports of a product merely

Japan, Venezuela. See *Tuna I*, at paras. 4.8, 4.11, 4.19, and 4.27.

¹⁹ See generally Jackson, "Congruence or Conflict", at 1227-59.

²⁰ *Tuna I*, at para. 4.11.

²¹ Jackson, "Congruence or Conflict", at 1241.

²² See Venezuela's submission to the Panel, *Tuna I*, at para. 4.27.

²³ *Id.* at para. 5.27. See also *id.* at paras 5.32, 4.18.

²⁴ See Kingsbury, "Tuna-Dolphin Controversy", at 18.

because it originates in a country with environmental policies different from its own."²⁵ To verify the approach, Kittichaisaree, a Thailand official, further elaborated that:

It is doubtful whether, in international law, the United States can assert the right to protect the life or health of human and animals in international areas or within the territory of other states. Compliance with domestic law of another state in spite of the fact that there is no international legal obligation to do so is contrary to the notion of *sovereign equality*.²⁶

Secondly, the application of unilaterally-set conservation standards will create unpredictability for nations against which the trade restriction is imposed. As stated, the MMPA linked the standards which Mexico had to meet during a particular period to the standards for US fishermen during the same period. In effect, there is an inherent risk that, as observed, "the United States might change the standard any time at its own whim, by amending its own domestic law without having to consult other nations."²⁷ So, unsurprisingly, Thailand could assert that "the inherent lack of predictability in the method for setting the incidental taking rate for Mexican fishermen would not help Mexican vessels at all in the conservation of dolphin."²⁸ Accordingly, the Panel pointed out that:

[t]he Mexican authorities could not know whether, at a given point of time, their conservation policies conformed to the United States conservation standards. The Panel considered that a limitation on trade based on such *unpredictable* conditions could not be regarded as being primarily aimed at the conservation of dolphins.²⁹

Thirdly, it had been proposed that the better method of solving international environmental problems was to procure international consultation rather than invoke unilateral actions.³⁰ In the light of the need for international institutional efforts to deal with dolphin conservation in the EPT, the Inter-American Tropical Tuna Commission (IATTC) has functioned in dealing with this issue since the 1970s.³¹ Evidence suggests that its work together with national actions had generated some

²⁵ *Tuna I*, at para. 6.2.

²⁶ Kittichaisaree, "Trade Sanctions and Subsidies", at 306 [emphasis added].

²⁷ Kittichaisaree, *id.* at 305; Kingsbury, "Tuna-Dolphin Controversy", at 19.

²⁸ *Tuna I*, at para. 4.25.

²⁹ *Id.* at para. 5.33; *see also id.* para. 5.28 [emphasis added].

³⁰ *E.g. see* Thailand and Venezuela's submission to the Panel, *id.* at paras. 4.25, 4.27.

³¹ In 1976, the IATTC began to deal with the issue of reducing incidental dolphin mortality arising from tuna-fishing. In June 1992, an "Agreement for Reduction of Dolphin Mortality in the Eastern Pacific Ocean" was concluded among the States fishing in the ETP. The efforts and effectiveness of

satisfactory results in reducing incidental dolphin mortality rate.³² Furthermore, the application of unilateral measures is likely to confuse countries who intend to abide by international standards. In January 1991, the IATTC recommended that "tuna fishermen, to preserve tuna stocks, concentrate their fishing on adult tuna, which swim with dolphin."³³ Also, it demanded that "tuna harvesters not attempt to avoid catching dolphin completely but continue to fish adult tuna while *using all possible measures to avoid the incidental catch of dolphins*."³⁴ Therefore, inevitably, there will be potential conflicts between the IATTC and the US's MMPA. For instance, countries that choose to comply with the IATTC standards may not be consistent with the requirement of the MMPA. It had been complained that:

Compliance with the IATTC recommendation to fish adult tuna would necessarily entail some incidental dolphin catch; non-United States harvesters were forced to choose between violating the IATTC recommendations or ceasing to fish in the ETP. For countries like Venezuela, for which the ETP was the only accessible year-round source of tuna and which were committed to the international standards of the IATTC, an MMPA embargo was virtually guaranteed.³⁵

Another reason why international cooperation is more welcome relies on its effectiveness, while unilateral actions are perceived to achieve limited and insufficient results. Both disputant countries, the US and Mexico, agree that the task of protecting dolphins is a global conservation issue, since they are highly migratory species that roam the high seas not subject to the jurisdiction of certain States.³⁶ Mexico argued that such a task cannot be accomplished without taking into account all the relevant elements affecting the effectiveness, such as the type of fishery, species of dolphin, fishing method used or geographical area.³⁷ The work of conservation Mexico believed can barely be achieved merely by US unilateral action, especially when the US tuna embargo is limited to dolphins of the EPT where harvesting tuna with purse-seining net kills dolphins.³⁸

the IATTC on dolphin conservation *see* Kingsbury, "Tuna-Dolphin Controversy", at 11-12 and n. 32.

³² *See* Kingsbury, *id.* at 11-12 and n. 32.

³³ *See Tuna I*, at para. 4.26.

³⁴ *Id.* [emphasis added].

³⁵ *Id.* at para. 4.28.

³⁶ *Id.* at paras. 3.34, 3.36, 3.38, 3.49, 3.55.

³⁷ *Id.* at paras. 3.34, 3.38.

³⁸ Mexico insisted that:

[i]f the purpose of the MMPA was to protect dolphins, as the United States claimed, then that legislation, in order to be compatible with the GATT and with its own objectives, should protect all dolphins regardless of the type of fishery, species of dolphin, fishing method used or geographical area, which was not the case under the special and selective provisions of the

Despite this contrary view,³⁹ the US insisted that "those measures were limited to the ETP because it was only there that the unique linkage between yellowfin tuna and dolphins occurred, so it was only there that the danger to dolphins from commercial tuna fishing existed."⁴⁰ Eventually, the Panel was obviously more impressed with Mexico's contention by stating:

[t]o pursue its dolphin protection objectives through measures consistent with General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.⁴¹

To sum up, of course, it will always be controversial whether the GATT regime, which, by nature, is designed to promote trade liberalisation, is the proper institution to evaluate the legality of such conservation-oriented trade measures.⁴² The GATT's basic stand toward unilateral methods employed to address global environmental issues, however, has reflected the general resistance to unilateralism in the GATT community⁴³ as well as generated substantial impact on latter instruments sharing a common concern regarding such issues.⁴⁴

(b) 1992 GATT Secretariat annual report on trade and environment

In its 1992 annual report, the GATT Secretariat included a special section on trade

MMPA on which the embargo was based.

Id. at para. 3.38.

³⁹ Referring to a 1991 report of the Food and Agriculture Organization on tuna-dolphin interactions, Mexico claimed that geographical linkage between yellowfin tuna and dolphin occurred worldwide. *Id.* para. 3.51. Also, according to the IATTC's report, "tuna fishing elsewhere may also threaten dolphins and marine mammals." *Id.* at para. 4.29.

⁴⁰ *Id.* at paras. 3.52, 3.54.

⁴¹ *Id.* at para. 5.28. The GATT believes its judgement on the dispute would facilitate the international cooperation. It remarked that:

These considerations led the Panel to the view that the adoption of its report would affect neither the rights of individual contracting parties to pursue their internal environmental policies and to co-operate with one another in harmonizing such policies, nor the right of CONTRACTING PARTIES acting jointly to address international environmental problems which can only be resolved through measures in conflict with the present rules of the General Agreement.

See id. at para. 6.4.

⁴² *See e.g.* Kingsbury, "Tuna-Dolphin Controversy", at 11. In its submission to the Panel, Australia contended that the GATT regime "had no competence to rule on the actual danger to health, morals or the environment represented by specific goods or their method of production (although it could accept expert evidence on such dangers)". *See Tuna I*, at para. 4.1.

⁴³ *See* Kingsbury, "Tuna-Dolphin Controversy", at 18. However, as discussed in chapter four of the thesis, the WTO/GATT, under certain circumstance, has begun to allow unilateral environmental measures to be justified under individual exceptional clause, even though they might not be always consistent with the chapeau requirements in Article XX of GATT 1994.

⁴⁴ *See infra* discussion.

and the environment.⁴⁵ This study primarily aimed to clarify the interrelationship between trade and the environment and highlight its policy toward the use of environmental trade measures.

As to the defence of the contribution of trade to a better environment, the GATT Secretariat first advocates that international trade regimes support environmental protection by increasing the efficiency of resource use and by raising incomes, thus making possible increased expenditures on the environment.⁴⁶ Additionally, "the need for multilateral cooperation"⁴⁷ in the environmental field became one of the principal themes in the report. To promote the necessity of multilateral cooperation in solving environmental challenges, it remarked that most environmental issues "all share a common need for multilateral cooperation, not only to minimize potential trade friction, but especially to identify and implement workable and effective solutions to regional and global environmental problems."⁴⁸ Therefore, in this sense, "[t]he only alternative to unilateral actions based on economic and political power is for countries to cooperate in the design, implementation and enforcement of an appropriate multilateral agreement for dealing with the problem at hand."⁴⁹ Moreover, it was also emphasised that multilateral cooperation may contribute to fairer remedies by minimising "the risk of solutions being imposed by the larger or richer countries."⁵⁰

The study recognises that promoting cooperation can be difficult, but, nevertheless, demands that offering certain incentives may be beneficial to achieve the objectives. It urged that the use of positive incentives coupled with peer pressure

⁴⁵ 1 General Agreement on Tariffs and Trade, International Trade 90-91 21 (1992) [hereinafter 1992 GATT Secretariat Report].

⁴⁶ See *id.* at 19. It has been stated that:

no evidence [suggests] that environmental quality deteriorates steadily with economic growth. Rather, for most indicators, economic growth brings an initial phase of deterioration followed by a subsequent phase of improvement. The turning point for the different pollutants vary, but in most cases they come before a country reaches a per capital of [U.S.]\$8,000.

See Grosman and Krueger, *Economic Growth and the Environment* abstract (National Bureau of Economic Research Working Paper No. 4634, 1994); Other studies regarding the contribution of economic activities to environmental protection generally see generally Esty, *Greening GATT*, at 63-64.

⁴⁷ Actually, the obligation to cooperate in preserving the environment has been regarded as one of the fundamental principles in international environmental law. A numerous international agreements, State practice, and judicial decisions all affirm its existence. See Boyle, "Principle of Co-operation", at 121-22; Sands, *International Environmental Law*, at 197-98; Kiss, "Rio Declaration", at 57, n. 8. In the 1992 Rio Declaration on Environment and Development, the requirement of cooperation becomes a primary mandate in this declaration. See Rio Declaration, Principles 5, 7, 9, 12, 13, 14, 24, and 27.

⁴⁸ 1992 GATT Secretariat Report.

⁴⁹ *Id.*

⁵⁰ *Id.*

could be a preferable option for promoting multilateral cooperation.⁵¹ By contrast, much doubt was cast on the imposition of negative incentives--"in particular, the use of discriminatory trade restrictions on products unrelated to the environmental issue at hand,"⁵² which is deemed as "[n]ot an effective way."⁵³

Although the report was critical of trade restrictions for promoting environmental objectives, it does not necessarily mean that all such measures are impermissible. Actually, at least as regards GATT rules, it could never block the adoption of environmental trade measures with "broad support in the world community."⁵⁴ Conversely, with respect to unilateral measures, it persistently reaffirms the basic stand taken in the 1991 Tuna/Dolphin case, which tended to reject unilateralism. The report demonstrated its inclination by stating: "What the rules do constrain is attempts by one or a small number of countries to influence environmental policies in other countries not by persuasion, but by unilateral reduction in access to their markets."⁵⁵ Again, it was argued that the unilateral imposition of national environmental standards may undermine the predictability required by commercial activities,⁵⁶ "since they prohibit making market access dependent on changes in the domestic policies or practices of the exporting country."⁵⁷ Fearing the method employed by powerful States will undermine the principle of sovereign equality, it further declared that "Countries are not clones of one another, and will not wish to become so--certainly not under the threat of unilateral trade measures."⁵⁸

Indeed, the GATT Secretariat report does not have any legal effect but is only a policy guideline. Nevertheless, it endorses the significance of "multilateral cooperation" in addressing global environmental challenges. Most importantly, it strengthens the conviction of the tuna/dolphin judgement regarding the environmental trade measures. It may be inferred from this study that the GATT regime's cautious stand over unilateral environmental methods may be hard to be modified in the short term. On the other hand, since a multilateral approach seems more compatible with the GATT rules, trade measures for environmental purposes may be under less

⁵¹ The measures may include, for instance, financial assistance and transfers of environmentally-friendly technology as well as action in the foreign aid, debt and market access areas.

⁵² 1992 GATT Secretariat Report.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

criticism as long as they obtain universal support.

2 The 1992 UNCED and Principle 12 of the Rio Declaration on Environment and Development

(a) General background

Twenty years after the proclamation of the Stockholm Declaration on the Human Environment,⁵⁹ faced with the continuing deterioration of the environment and serious degradation of the global ecological system, the international community found it urgent to set up a new global forum to address the vital issue adequately.⁶⁰ By a resolution of the United Nations (UN) General Assembly,⁶¹ a decision had been made to convene a United Nations Conference on Environment and Development to be held in Rio de Janeiro, Brazil in June 1992.⁶²

It is apparent that the concept of "sustainable development"⁶³ has been firmly recognised as the core theme of the 1992 UNCED,⁶⁴ which requires an integration of both mandates of environment and development. As a result, a number of legal principles are essential to be elaborated and articulated to promote such goal. In the UN Resolution that initiated the Conference, the elaboration of general rights and obligations of States in the field of the *environment* was included as one of the principal objectives of the Conference.⁶⁵ Then, after the UNCED Preparatory Committee (Precom)⁶⁶ assigned the major substantive issues to two working groups,⁶⁷

⁵⁹ Declaration of the United Nations Conference on the Human Environment, Stockholm, UN Doc. A/CONF. 48/14 & Corr. 1 (1972).

⁶⁰ See Mensah, "Role of the Developing Countries", at 34. See also the preamble of the UN GA Res. 44/228 of 22 December 1989 [hereinafter UN Res. 44/228].

⁶¹ UN Res. 44/228.

⁶² *Id.* at Part I, para. 1.

⁶³ The concept of "sustainable development" was first articulated by the World Commission on Environment and Development (WCED). The Commission urged that "there is now a need to consolidate and extend relevant legal principles in a new charter to guide state behavior in the transition to sustainable development." See WCED, *Our Common Future* 332-33 (1987). Furthermore, it defined the concept as:

Sustainable development is development that meets the needs of the present without comprising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of need, in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state technology and social organization on the environment's ability to meet present and future needs.

Id. at 43. The legal implication of sustainable development see generally Boyle and Freestone (eds.), *Sustainable Development*; Lang (eds.), *Sustainable Development*.

⁶⁴ The goal of achieving "sustainable and environmentally sound development" had been proclaimed as the main task of UNCED, see UN Res. 44/228, at Part I, para. 3. Indeed, this concept had been repeatedly emphasised by the UN Res. 44/228. See *id.* paras. 12, 15 (c) etc.

⁶⁵ *Id.* Part I, para. 15 (d).

⁶⁶ Prior to the 1992 UNCED, in addition to Organizational Session that had been held in New York in

at its Second Session, the Committee decided to establish a Working Group III to deal with legal, institutional and all related matters. One of the group's main tasks was to examine the feasibility of elaborating principles on general rights and obligations in the fields of *environment and development*, and to consider the incorporation of such principles in the form of an instrument/charter/statement/declaration.⁶⁸ It is true that the Committee broadened the range of the originally proposed documents so as to better encompass the issue of both the environment and development.⁶⁹ The modification, however, reflects the genuine expectation of Resolution 44/228 that regarded the artful balance between environment protection and necessary development as in the best interests of human society.⁷⁰ With respect to the title of the instrument, a number of representatives, including the UNCED Secretary-General Maurice Strong favoured the style of "Earth Charter."⁷¹ But, ultimately, the title of the "Rio Declaration on Environment and Development" was finalised after intense debate.⁷²

As to the specific issue of trade and the environment, it seems that this topic had not yet formally reached the Precom until the final stages of negotiation.⁷³ It is partly because the awareness of the potential conflict between environmental protection and trade rules had not yet been triggered until early 1990s, as we saw in the GATT Tuna/Dolphin case.⁷⁴ On the other hand, the content of the legal rules governing this issue was largely formulated by other competent institutions instead of the Precom itself.⁷⁵ The work notably by the United Nations Conference on Trade and Development (UNCTAD) proved extremely influential upon the final text of the principle of trade and environment in the Rio Declaration. The following proceeds to

March 1990, four sessions of Preparatory Committee (Nairobi, 6-31 Aug. 1990; Geneva, 18 Mar. to 5 Apr. and 12 Aug. to 4 Sept. 1991, and New York, 2 Mar. to 3 Apr. 1992) also had taken place. *See id.* Part II, para. 1.

⁶⁷ Working Group I will study items (a), (d), (e) and (f); Working Group II will work on items (b), (c) and (g) of the issues listed in UN Res. 44/228, at Part I, para. 12.

⁶⁸ The terms of reference of Working Group III *see* UN Doc. A/46/48 (1991); UN Doc. A/Conf. 151/PC/L. 31, Annex (1991).

⁶⁹ *See* Sand, "Earth Summit", at 347.

⁷⁰ The Resolution explicitly demands that the Conference address "environmental issues in the developmental context." *See* UN Res. 44/228, at Part I, para. 15.

⁷¹ *See* Kovar, "Rio Declaration", at 122-23.

⁷² *Id.* [emphasis added].

⁷³ Prior to PrepCom IV, evidence suggests that discussion regarding the elements for inclusion in the declaration/charter has not yet addressed the issue of trade and environment. *See* UN Doc. A/CONF. 151/PC/WG III/2 (1991); A/CONF. 151/PC/78 (1991).

⁷⁴ *See* chapter four of the thesis.

⁷⁵ The influence by other institutions on specific issues of the UNCED, like nuclear safety, ecological crimes *see* Sand, "Development of International Environmental Law", at 10-11.

disclose the contribution by the organisation to the critical issue.

(b) The 1992 Cartagena Commitment of UNCTAD

To encourage universal participation in the preparation for UNCED, UN Resolution 44/228 requests:

[t]he United Nations Environment Programme, as the main organ dealing with environmental issues, and other organs, organisations and programmes of the United Nations system, as well as other relevant intergovernmental organizations, to contribute fully to the preparations for the Conference on the basis of guidelines and requirements to be established by the Preparatory Committee.⁷⁶

The UNCTAD established in 1964 as an intergovernment body of the UN was set up to study and coordinate the common policy on the *integrated treatment of development* and interrelated issues areas of trade, finance, technology, investment and sustainable development.⁷⁷ Obviously, UNCTAD was relatively keen to respond to the request of the UN Resolution concerning a collective contribution to the preparation for the Rio Conference. On the eve of the 1992 UNCED, the eighth session of UNCTAD was held in Cartagena, Colombia. In a message to UNCED, the session pledged that it "attaches high priority to acceleration of development that is environmentally sound and sustainable" and "enhance the well-being of today's generations, while preserving the capacity of future generations to meet their own needs."⁷⁸ In the "Cartagena Commitment"⁷⁹ adopted by the session, the Conference reaffirmed, *inter alia*, "the importance it attributed to sustainable development and identified it as one of the four priority areas."⁸⁰ Thus, it established substantial guidelines and work programmes in the areas of finance, trade, technology and commodities.⁸¹

As to the tasks for the harmonisation of environment and trade, the Commitment determined that:

UNCTAD, at both the intergovernmental and the Secretariat levels, taking into account the work

⁷⁶ UN Res. 44/228, at Part II, para. 9.

⁷⁷ See < <http://www.unctad.org/> >.

⁷⁸ Message from the Eighth Session of UNTAD to the United Nations Conference on Environment and Development (UNCED), reprinted in 22 *EPL* (1992), at 190.

⁷⁹ A New Partnership for Development: The Cartagena Commitment, UN Conference on Trade and Development, 8th Sess. (Cartagena de Indias, Colombia, Feb. 8, 1992), reprinted in 22 *EPL* (1992), at 134.

⁸⁰ *Id.*

⁸¹ *Id.*

of other relevant fora, should undertake in-depth work on the clarification of the linkage between trade and environment and the need for environmental protection to co-exist with liberal trade policies and free market access and contribute to consensus building with regard to appropriate principles and rules.⁸²

More importantly, it made efforts to articulate specific "policy objectives" by which the interaction between environment and trade could best be guided. Generally speaking, it shares a common ground with the GATT regime's basic stand, built since the emergence of the tuna/dolphin dispute. But, its formulation is embodied in a relatively delicate and succinct expression. In the beginning, consistent with the GATT Secretariat Report, it recognised that a free trade regime, especially paying due regards to developing countries, combined with a sound environmental policy may generate a positive impact on environmental protection.⁸³

Furthermore, it spelled out several constraints on the implementation of trade-related environmental policies. Since such trade measures under the guise of protecting the environment may be abused, it first urged States to adopt environmental measures that "deal with the root causes of environmental degradation, thus preventing environmental issues from resulting in unnecessary restrictions to trade."⁸⁴ Then, it reaffirmed one of the GATT norms regulating the use of trade measures by declaring "trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustified discrimination or a disguised restriction on international trade."⁸⁵ As to unilateral actions of enforcement, *inter alia*, leading to interruption of trade directly, the Commitment basically echoed the vision of the previous GATT documents on trade and environment, which rejects unilateralism and braces a multilateral approach. It proposed that:

Unilateral actions to deal with environment challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transborder or global environmental problems should, as far as possible, be based on an international consensus.⁸⁶

On the other hand, the Commitment articulated certain principles and rules that should be applied to trade policy measures if they are found necessary for the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* See also the GATT, Art. XX.

⁸⁶ *Id.*

enforcement of environmental policies. These principles include, *inter alia*:

- a. The principles of non-discrimination;
- b. The principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives;
- c. An obligation to ensure transparency in the use of trade measures related to the environment and to provide adequate notification of national regulations;
- d. The need to give consideration to the special conditions and developmental requirements of developing countries as they move towards internationally agreed environmental objectives.⁸⁷

Actually, those principles have largely reflected the basic aspiration of trade regime, namely the WTO/GATT.⁸⁸

It may be inferred that the "Cartagena Commitment" of UNCTAD is the second primary international document after the GATT regime, which aims to constrain the deliberate use of environmental trade measures. The formulation of the document further heralds an increasing resistance against unilateral trade restrictions for environmental purpose. Not surprisingly, such an inclination toward addressing environmental issue in the context of preserving market access will be fully supported, especially by developing countries that constantly rely on exports to sustain their economic growth.

(c) The conclusion of Principle 12 of the Rio Declaration

The introduction of this principle mainly reflects the expectation of the representatives of nations that value the significance of reconciling the conflict between trade and the environment. In particular, most delegates recognised the importance of including this principle at a time when unilateral trade measures are increasingly being employed by economically powerful States to influence the environmental policy of other countries. During the process of negotiation, some delegates, however, were still doubtful about the necessity of including such a principle on the ground that the proposed text had already been reflected in other institutions' documents, particularly the GATT's regime.⁸⁹ But, countries of the South

⁸⁷ *Id.*

⁸⁸ See chapter four of the thesis.

⁸⁹ Mensah, "Role of the Developing Countries", at 46.

contended that this principle is self-explanatory;⁹⁰ they further argued that "if it is already reflected in the GATT documents, then there should not be any problem accepting its inclusion here."⁹¹ Though such principle, like other issues, was defended mostly by developing countries,⁹² other developed nations, like the European Community⁹³ also insisted upon the incorporation of this principle.⁹⁴ It is partly because they could also suffer from the implementation of unilateral environmental measures.

The proposed text known as Principle 12 reads as:

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and *sustainable development* in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. *Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.*(emphasis added)

It is evident that this literature amply codifies the expression of the "Cartargena Commitment" of UNCTAD with little change. The Rio text simply adds the first clause to the original arrangement of the Commitment, which not only supports an open international economic system, but also "tempers its support of the liberal trading system by incorporating the goal of sustainable development as an element of trade policy."⁹⁵ Thereafter, the remaining formulations were actually taken verbatim from the UNCTAD's work,⁹⁶ while those detailed principles indicated above to ensure the necessity of environmental trade measures spawned by the latter, are not incorporated.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² The negotiation process of the preparations for the Rio Declaration mainly focused on the reconciliation of the views between the G-77, the group of developing countries, and the States of the Organisation for Economic Co-operation and Development (OECD). Eventually, the document largely reflected the G-77 negotiating text. See Mann, "Rio Declaration", at 408. The principles on which developing countries put much emphasis roughly include the right to development, common but differentiated responsibility to the environment, trade restrictions and environment, and transfer of technology. See Mensah, "Role of the Developing Countries", at 40-47; e.g. Mann, *id.* at 408-10.

⁹³ By signing the Treaty on European Union signed in 1992, the European Community was incorporated into the European Union.

⁹⁴ See Kovar, "Rio Declaration", at 132.

⁹⁵ See International Economy and the Environment, in 3 *Yb. Int'l Envtl L.* 342 (1992).

⁹⁶ See also Sand, "Development of International Environment Law", at 11; The term "transboundary" in the last sentence replaces "transborder" used in the Cartargena Commitment."

The proposed Principle 12, along with the other principles, was finally reviewed by a small group of seven industrialised and seven developing countries under the direct chairmanship of Precom Chairman Tommy Koh.⁹⁷ Then, the text was concluded by the Precom IV and referred to the Rio Conference for further negotiation and finalisation.⁹⁸ Eventually, the draft Declaration on Environment and Trade was adopted at Rio without modification. Nevertheless, some nations made certain statements related to the principles, indicating differences in opinion.⁹⁹ As to Principle 12, since it was formulated to impose constraints on States' unilateral environmental actions usually in the form of trade restrictions, not surprisingly, the US that strongly defends the policy of unilateralism expressed its reservations regarding the Principle. The interpretative statement by the US for Principle 12 recorded:

The United States understands that, in certain situations, trade measures may provide an effective and appropriate means of addressing environmental concerns, including long-term sustainable forest management concerns and environmental concerns outside national jurisdictions, subject to certain disciplines.¹⁰⁰

(d) The legal implications of Principle 12

The elements embodied in the Rio Declaration amount to twenty-seven principles in total. Some of them are included merely to confirm or reflect the customary rules of law.¹⁰¹ Meanwhile, the Rio Declaration was designed to reinforce new emerging principles that have already been found in a considerable number of treaties and State practice.¹⁰² On the other hand, it has been observed that some other principles, probably at least half of them, are more akin to policy statements and guidelines than of a legal character.¹⁰³ But, in general sense, it should be noted that, as Boyle and Freestone observe, many terms of the Rio Declaration "are capable of being and were

⁹⁷ Kovar, "Rio Declaration", at 122.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ UN Doc. A/CONF. 151/26, Vol. IV., at 21. Apart from Principle 12, the US's reservation also covers Principle 3, 7, and 23. See Kovar, "Rio Declaration". at 126, 129-30, and 137-38.

¹⁰¹ For instance, the sovereign right to exploit resources and obligation to safeguard environment in Principle 2; the obligation to cooperate in good faith in Principle 7 and 27. See Kiss, "Rio Declaration", at 56-58. Also, the obligations, such as the notification of emergencies, prior notification, and consultation in cases of transboundary risk are included in the Rio Declaration. See Birney and Boyle, *Basic Documents*, at 9.

¹⁰² Those principles comprise precautionary action, environment impact assessment, the polluter pays principle. Birney and Boyle, *id.*

¹⁰³ Kiss, "Rio Declaration", at 56, 62-63.

intended potentially to be norm-creating or to lay down the parameters for further development of the law."¹⁰⁴

Strictly speaking, the elements of trade and environment are characterised "as an approach of policy containment."¹⁰⁵ The classification might be perceived by the following analyses that plainly put much emphasis on the origin and structure of Principle 12. First of all, as indicated, the UNCTAD's formulation contributed greatly to the text of the Principle. The original text in the "Cartagena Commitment" was arranged initially in the form of *policy objectives*¹⁰⁶ by which the potential conflict between environmental protection and trade liberalisation might be reconciled. As a result, Principle 12 carries more indications of policy guidelines. Moreover, the language the principle adopted suggests that the drafters of the Declaration seemed to agree that there was no hurry to determine whether unilateral environmental actions, in spite of clear drawbacks, were legal or not, and, thus, called for *avoidance*, not *prohibition* of unilateral measures. More importantly, it suggests a preferable approach to deal with international environment problems. In short, seeking collective efforts in an attempt to reach international consensus proves a better solution than unilateral actions if certain environmental measures are inevitable. By the same token, by reading the third and last clause of Principle 12 together, it has been observed that such a context conveys a procedural message,¹⁰⁷ which implies "unilateralism. . . are unacceptable, while multilateral approaches and consensus are strongly encouraged."¹⁰⁸

Although Principle 12, by nature, is subject to policy orientation¹⁰⁹, it does carry a certain degree of legal implication. It is evident that the Principle is characterised by the use of the word "should." The arrangement implies that, more or less, it tends to impose constraints on States' conduct and to direct the way they should follow. As Kiss noted, "Drafted in a more stringent form, these provisions could have legal implications. Indeed, they include applications of the doctrine of abuse of rights, of

¹⁰⁴ Boyle and Freestone, "Introduction", at 3.

¹⁰⁵ Vaughan, "Trade and Environment", at 603; *see also* Kiss, "Rio Declaration", at 62-63.

¹⁰⁶ The Cartagena Commitment [emphasis added].

¹⁰⁷ *See* Kennedy, "Reforming U.S. Trade Policy", at 197. On the other hand, Kennedy notes that Principle 12 also bears a substantive message. It means that "[w]hen trade measures are used in the name of environmental protection, the means and the ends should be closely and causally linked." *id.*

¹⁰⁸ *Id.*

¹⁰⁹ Some writers consider the expression of Principle 12 to be "in aspirational rather than obligatory terms, suggesting a rather weaker commitment on these economic issues. . ." Boyle and Freestone, "Introduction", at 4.

the rule of non-intervention and of rule of good neighbourship."¹¹⁰

Moreover, Principle 12, by and large, reflects the view of the overwhelming majority of States at UNCED, which opposes unilateral trade measures under the guise of environmental protection.¹¹¹ It is true that the device of the Principle can be regarded as pro-trade and economic development¹¹² as well as pro-developing countries or nations that rely heavily on the benefits arising from trade activities.¹¹³ But, its eventual inclusion in the Rio Declaration was upheld not only by the South States but also by the OECD members. Unlike other issues that ever split the participants at UNCED,¹¹⁴ Principle 12 was one of the few principles that had ever reached a universal consensus, notwithstanding the US's unique interpretative statement. Though, arguably, the very legality of unilateral enforcement of environmental standards cannot be determined by Principle 12, the way that it treats unilateral methods seems to suggest that universal anti-unilateralism makes such a method, if not impossible, at least difficult, to stand justification under various legal regimes,¹¹⁵ particularly trade regimes.

¹¹⁰ See Kiss, "Rio Declaration", at 63.

¹¹¹ See Kingsbury, "Tuna-Dolphin Controversy", at 18; see also Kittichaisaree, "Using Trade Sanctions", at 308.

¹¹² As Kennedy contended, "[t]he Rio Declaration provides a broad framework for harmonizing environmental and trade concern. In the event that the two concerns conflict, the Rio Declaration gives trade issues primacy over environmental concerns." See Kennedy, "Reforming US Trade Policy", at 196.

¹¹³ It has been observed that "Principle 12 is attractive to many developing countries because it adopts a policy sequencing assumption which, put most simply, links the economic benefits of trade liberalization with improvements in environmental protection." See Vaughan, "Trade and Environment", at 603.

¹¹⁴ For instance, even the title for the document that contains the general rights and obligations adopted by the UNCED was controversial. Most industrialised countries favoured the "Earth Charter", which aims to be readable, understandable and accessible to everyone. By contrast, the G-77 regarded the title as being unbalanced, which might unduly emphasises the environment at the expense of development. So, they preferred a expression of UN resolution. See Kovar, "Rio Declaration", at 122-23; Mann, "Rio Declaration", at 408-9. Additionally, the North and South had fundamentally different prospective regarding the primary concept dominating the UNCED. The developed countries (North) support the inclusion of principles of public participation, precautionary approach and polluter pays. On the other hand, the developing countries (South) insisted that the right to development, poverty alleviation and the recognition of common but differentiated responsibilities be incorporated in the documents of UNCED. See e.g. Sand, "Development of International Environmental Law", at 8; Mensah, "Role of the Developing Countries", at 33-52.

¹¹⁵ Cf. By strictly reading the text of Principle 12 regarding the legality of unilateral actions, some authors argued that, under certain circumstance, such a measure may be permissible because the principle does not explicitly proscribe the use of unilateral environmental measures. See Sands, *Principles*, at 190, 717.; Blank, "Environmental Trade Measures", at 97-98. But Sands admits that "it is not yet clear how the practice of states . . . will develop . . ." and predicts that:

The challenge for the international community in coming years will be to determine the circumstances in which, in the absence of international consensus on agreed environmental standards, a state will be permitted, under the general rules of international law and the specific rules of the GATT, to adopt unilateral environmental measures and apply them extraterritorially.

Additionally, the introduction of Principle 12 appears to be a result of codifying the emerging rules regarding the permissibility of environmental trade measures, if the background under which the Principle was generated is carefully examined. As observed, it mainly reflects the view of the GATT regime as well as that of the UN organisations, particularly UNCTAD, which generally rejects unilateralism in favour of collective efforts whenever a global environmental problem has to be solved. Though it has been a short time since the rule was originally initiated in 1991, such timely inclusion of this principle at UNCED demonstrates the urgency and necessity of placing the issue in the forefront of the development of international environmental law.

Overall, Principle 12 can be seen as a product of policy guidelines, but with a particularly normative implication. Not in a form of official agreement, the Rio Declaration is not a legally binding instrument. Nevertheless, it has been pointed out that:

Like the Stockholm Declaration, the Rio Declaration is not formally binding, but its adoption by a consensus of 176 states, after a prolonged negotiating process, and its normative character, make it a particularly important example of the use of soft law instruments in the process of codification and development of international law.¹¹⁶

Further, given some features embodied in the Declaration, such as obligatory description, package-deal character and real consensus of developed and developing States, Boyle and Freestone maintain that these factors "give the Rio Declaration significant authority and influence in the articulation and development of contemporary international law relating to the environment and sustainable development."¹¹⁷ Therefore, Principle 12 is likely to generate a greater influence on the development of feasible norms constraining the use of unilateral trade measures in the future.

(e) Other UNCED documents that deal with the unilateral environmental measures

Of course, the conclusion of the Rio Declaration on Environment and

See id. Indeed, the unilateral remedy may be justified under the regime of countermeasures. The draft article of State Responsibility does recognise the right of State to resort to unilateral enforcement under certain circumstances. Yet, the rule regarding the actions is still evolving, and the fate of the draft is also uncertain. *See* discussion in chapter two of the thesis..

¹¹⁶ Birnie and Boyle, *Basic Documents*, at 9. *See also* Boyle, "Reflections on Treaties and Soft Law," at 904.

Development was a prominent achievement at UNCED. In addition, the Rio Conference also produced four other significant documents addressing the issue of environment and development, namely Agenda 21,¹¹⁸ Forest Principles¹¹⁹ and two international framework conventions on climate change¹²⁰ and biodiversity.¹²¹ Those instruments, except the Biodiversity Convention, in one way or another, do contain the provisions regulating trade-related environmental measures. As the topic is arranged in a way to serve respective purpose in these UNCED documents, it appears that the central mandate of Principle 12 of the Rio Declaration largely permeates through these documents.

(i) Agenda 21

In the second session of the Precom, consensus was reached in demanding that UNCED produce six major categories of result.¹²² One of them is "an agreed programme of work by the international community addressing major environment and development priorities for the initial period 1993-2000 and leading into the 21st century,"¹²³ which is known as Agenda 21. The instrument is designed to direct and coordinate "sectoral and intersectoral activities at the global, national and regional levels."¹²⁴ Therefore, the style of Agenda 21 makes it in the very nature of a policy guideline and statement rather than a legal agreement.¹²⁵

The content of Agenda 21 that comprises forty chapters was divided into four sections. They include: social and economic development (Chapter 1-8); natural resources, fragile ecosystems and related human activities, byproducts of industrial production (Chapter 9-22); major groups (Chapter 23-32); and means of implementation (Chapter 33-40). Among them, there are two chapters mentioning the relationship between trade and the environment, where the substance of Principle 12 of the Rio Declaration is further elaborated in a longer and more detailed form.

¹¹⁷ Boyle and Freestone, "Introduction", at 3-4.

¹¹⁸ Agenda 21: Programme of Action for Sustainable Development, United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Rio de Janeiro, Brazil.

¹¹⁹ UNCED, A/CONF. 151/26/Rev. vol. III, Annex III.

¹²⁰ The UN Framework Convention on Climate Change, adopted June 1992, in force 24 Mar. 1994.

¹²¹ The UN Convention on Biological Diversity, adopted 5 June 1992; in force 29 Dec. 1993.

¹²² See the report to the second session of the Precom by Strong, Secretary General of the Conference, UN A/CONF. 151/PC/14, paras. 49-58.

¹²³ *Id.*

¹²⁴ See Biggs, "Brazil Conference on the Environment" at 401.

¹²⁵ Grubb *et al*, *Earth Summit Agreements*, at 97. It has been observed that "[m]any parts of the Agenda 21 text appear either as statements of the obvious, or as a simplistic policy 'wish list'." See *id.*

Chapter 2--"International Cooperation to Accelerate Sustainable Development in Developing Countries and Related Domestic Policies" reaffirms that environment and trade policies should be mutually supportive so as to fulfill the goal of sustainable development.¹²⁶ On concrete activities, para. 2.22 requires relevant international and regional economic institutions, like the GATT and UNCTAD, in accordance with their respective mandates and competence, to examine certain propositions and principles.¹²⁷ In fact, these items under scrutiny have been addressed in the relevant GATT and UNCTAD documents as well as Principle 12 of the Rio Declaration.

In Chapter 39--"International Legal Instruments and Mechanism", the most detailed and comprehensive language related to trade restrictions for environmental purposes has been provided. It specifies:

To promote, through the gradual development of universally and multilaterally negotiated agreements or instruments, international standards for the protection of the environment that take into account the different situations and capabilities of countries. States recognise that environmental policies should deal with the root causes of environmental degradation, thus preventing environmental measures from resulting in unnecessary restrictions to trade. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenge outside the jurisdiction of the importing country should be avoided. Environmental measures addressing international environmental problems should, as far as possible, be based on an international consensus. Domestic measures targeted to achieve certain environmental objectives may need trade measures to render them effective. Should trade policy measures be found necessary for the enforcement of environmental policies, certain principles and rules should apply. These could include, *inter alia*, the principle of non-discrimination; the principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives; an obligation to ensure transparency in the use of trade measures related to the environment and to provide adequate notification of national regulations; and the need to give consideration to the special conditions and development requirements of developing countries as they move towards internationally agreed environmental objectives.¹²⁸

Actually, such a text is far from novel. It literally adopts the formulation of the earlier Cartagena Commitment of the UNCTAD. Meanwhile, the text of Principle 12 can be fully located in these paragraphs with only minor change.¹²⁹

¹²⁶ See Agenda 21, Chapter 2, paras. 2.19, 2.20.

¹²⁷ In total, twelve items are listed. See paras. 2.22 (a) to (l).

¹²⁸ Agenda 21, para. 39.3(d).

¹²⁹ The term, "international environmental problems" in the Agenda 21 text, is substituted by "transboundary or global environmental problems" in the Rio Declaration.

(ii) Forest Principles

Global forest conservation was one of the issues arousing heated debate during the pre-Rio Summit. Particularly, there was intense disagreement among the North and South concerning the form of the document governing the topic. Most developed countries urged the formulation of a world forest treaty with substantially mandatory force.¹³⁰ In contrast, developing countries worried that a treaty regime may run the risk of diminishing their sovereign rights over the control of national forest resources,¹³¹ and insisted on adopting a form of non-binding principle regarding forests.¹³² After acrimonious negotiations, the instrument of forest principles instead of convention was adopted at UNCED.

The Rio Forest Principles, formally titled "Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests," contains fifteen specific principles. Trade and the environment was also an element embodied in the Principles. Basically, reflecting trade liberalisation, it proposes a system of open and free trade by calling for non-discrimination, and reduction and removal of tariff barriers.¹³³ Meanwhile, for environment protection, it requires the integration of forest conservation and sustainable development with economic, trade and other relevant policies¹³⁴ as well as the avoidance of policies and practices, including trade, leading to forest degradation.¹³⁵

Moreover, like Principle 12 of the Rio Declaration, the Forest Principles essentially tend to reject unilateral measures, but have a slightly different arrangement. It provides that "Unilateral measures, *incompatible with international obligations or agreements*, to restrict and/or ban international trade in timber or other forest products should be *removed* or avoided, in order to attain long-term sustainable forest management."¹³⁶ A careful examination of the text may reveal two messages.

¹³⁰ At the summit of the G-7 countries held in Houston in June 1990, the idea of formulating a world forest treaty had been firmly proposed. They called for the negotiation of such a treaty "as expeditiously as possible", so that it could be signed in Rio de Janeiro during UNCED. See Johnson, *Earth Summit*, at 103.

¹³¹ *Id.* see also Sand, "Development of International Environmental Law", at 9-10.

¹³² See Johnson, *Earth Summit*, at 103.

¹³³ The Forest Principles, section 13 (a) and (b).

¹³⁴ *Id.* (d).

¹³⁵ *Id.* (c).

¹³⁶ *Id.* section 14 [emphasis added].

First of all, it seems to condition the permissibility of unilateral actions on compatibility with international agreements or legal rules. It implies that unilateral measures may be permitted as long as they prove compatible with international law. In a sense, at least for the purpose of forest conservation, the Principles do open a door for the use of unilateral trade restrictions, which still should be subjected to international law. Nonetheless, it also creates a problem regarding the interpretation of alleged "compatibility." For instance, as to the interrelationship of unilateral remedy and multilateral environmental agreements, it is not clear to what extent the mandate of compatibility should extend. Surely, unilateral actions authorised by the treaty secure the compatibility in such sense. It remains uncertain, however, whether measures recommended by the competent regime are consistent with that international agreements. Although the text may help clarify the conditions which constitute an acceptable unilateral action, the ambiguous language may cause further confusion regarding the legality of the measures.

Secondly, as to the effect of an impermissible unilateral measure, it not only called for avoidance but also the removal of any unilateral trade ban. Therefore, in effect, an existing implemented measure if not compatible with international law should be dismissed. Certainly, it imposes tougher constraints on the users of unilateral measures to the extent that they are obliged to remove the means in force. For countries against whom unilateral measures are applied, admittedly, the device regards their interests properly. It is doubtful, however, whether the document may provide them with effective relief due to its somewhat soft-law character.

Indeed, the text concerning regulating unilateral trade measures in the Forest Principles adds some flavour to Principle 12 of the Rio Declaration. It also, however, leaves several critical questions unresolved. Given its vague content and the absence of empirical evidence, the device used in the Forest Principles still need further study.

(iii) The UN Framework Convention on Climate Change

Acknowledging climate change resulted from the increase of greenhouse gases¹³⁷

¹³⁷ The gases that cause the greenhouse effect includes carbon dioxide, methane, chlorofluorocarbons and nitrous oxide. See the study by the Intergovernmental Panel on Climate Change (IPCC), Working Group I (1990), at 5-37.

and its adverse effects¹³⁸ as a common concern of humankind, UN Resolution 44/228 explicitly listed the topic of "protection of the atmosphere by combating climate change, . . ." as one of the major environmental/developmental issues set to be addressed in the 1992 UNCED.¹³⁹ The Precom then resolved to produce a specific legal instrument on climate change. Eventually, there was considerable agreement as to the adoption of an international framework convention on climate change at UNCED as a first multilateral step aimed at solving the urgent problem.¹⁴⁰

In the 1992 United Nations Framework Convention on Climate Change (UNFCCC), several principles guiding the Parties are provided in order to achieve the objectives of the Convention. Not unpredictably, it adequately reflects the basic principles of the Rio Declaration on Environment and Development, which require common but differentiated responsibility¹⁴¹ on one hand as well as precautionary measures¹⁴² on the other. In addition, the issue of trade and environment also becomes its focus. It mandates that:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly *developing country Parties*, thus enabling them better to address the problems of *climate change*. Measures taken to combat climate change, including *unilateral ones*, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.¹⁴³

Actually, the language merely repeats the first and second clause of Principle 12 of the Rio Declaration and slightly changes certain wordings in order to accommodate the particular needs of this convention. Unlike the UNCED instruments indicated

¹³⁸ The greenhouse effect will raise global temperature, leading to the rise of sea level, the increase of flood and drought, and the deterioration of desertification. *See generally* Taylor, *Ecological Approach*, at 14-19.

¹³⁹ UN Res. 44/228, at Part I, para. 12 (a).

¹⁴⁰ Even there is a consensus to form a convention to address the climate change, it became contentious about what structure of such treaty should be based. Some favoured a convention containing binding commitments. Other with cautious mind proposed first a general legal framework, leaving any binding measures to subsequent negotiations. *See* Grubb *et al*, *Earth Summit*, at 61-62. The latter proposal finally prevailed over that of former. Since the treaty came into force, one Kyoto protocol has been forged in 1997, which aims to set different level of standard on reducing emission of greenhouse gases for several categories of States.

¹⁴¹ *Id.* Art. 3 (1), (2). *See also* Principle 7 of the Rio Declaration, which allow States to bear different level of obligations in view of their different contributions to global environmental degradation.

¹⁴² *Id.* Art. 3 (3). *See also* Principle 15 of the Rio Declaration. The principle is a relatively new developing principle, which has been located in several treaties and State practices. *See generally* Freestone and Hey, *Precautionary Principle*; O'riordan and Cameron, *Interpreting Precautionary Principle*.

¹⁴³ *Id.* Art. 3 (5).

above, it does not expressly mandate the avoidance or removal of unilateral actions. Despite such an omission, it seems far from clear whether the convention, in one way or another, has the intention of embracing unilateral actions. Nonetheless, it should be noted that the climate change convention was the document passed at UNCED as the Rio Declaration. Arguably, there is no reason that the principle of the former will be contrary to that of the latter. Accordingly, it is believed that the call for avoidance of unilateral actions by the Rio Declaration should apply to the convention.

3 Post-Rio evolution

Since the UNCED documents were concluded, a number of practices and decisions regarding unilateral environmental trade measures have emerged. It is imperative to examine such developments during the post-Rio period in order to ascertain how the principles governing environmental trade measures have evolved and been applied in the contemporary world community.

(a) The European Union's approach

In its proposal submitted to the GATT Group on Environmental Measures and International Trade in November 1992, the Commission of the European Communities expressed its ideas on the permissibility of environmental trade measures (ETMs).¹⁴⁴ Like the European Community's opinion in the *Tuna/Dolphin* case,¹⁴⁵ the document continues to adopt a sceptical policy towards the unilateral use of ETMs by insisting that "a country should not unilaterally restrict imports on the basis of environmental damage. . ."¹⁴⁶ The document, on the other hand, also helps clarify the concept of "international consensus", which warrants EMTs and also has been sharply encouraged by Principle 12 of the Rio Declaration. Strictly speaking, it tends to confine the concept to the existence of a pertinent "multilateral environmental agreement (MEA)."

Indeed, there are certain provisions of ETMs specified in the context of MEAs, such as the Convention on International Trade in Endangered Species (CITES)¹⁴⁷, the

¹⁴⁴ Directorate-General for External Relations, European Commission, The GATT and Trade Provisions of Multilateral Environmental Agreements (13 Nov. 1992) [hereinafter EC Document].

¹⁴⁵ *Tuna I*, at para 4.11.

¹⁴⁶ EC Document, at 2.

¹⁴⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 Mar. 1973, in force 1 July 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243.

Basel Convention,¹⁴⁸ and the Montreal Protocol.¹⁴⁹ Unlike the usual unilateral measures, such trade restrictions on endangered species, hazardous waste, and ozone-depleting substances are commonly deemed to be an indispensable means to achieve individual environmental purposes. Not surprisingly, the EC document will claim that "it appears that in all cases the rationale for trade measures has been to ensure the effective implementation of commitments to protect the environment."¹⁵⁰ In particular, the EC has not yet been ready to endorse certain ETMs employed as a tool to enforce compliance with environmental standards, which have been, in most case, trade sanctions.¹⁵¹ As a matter of fact, such coercive measures "based on the need to force countries to sign an agreement or to punish 'free-rider' behaviour"¹⁵² usually underline a distinguishing feature of unilateral actions. Thus, probably, such character of the measures makes the EC hesitate to accept unilateral ETMs.

It may be concluded that the EC's rigid interpretation of "international consensus" will eventually exclude certain unilateral measures bearing a strong connection with MEAs, such as measures aiming to enforce international environmental law, from the permissible catalog of ETMs.

(b) The adjustment of the US's policy

Even though the US's tuna embargo against Mexico was decided by the 1991 GATT Panel as GATT-illegal, there is no sign that the US will relinquish the policy of using unilateral ETMs to achieve certain environmental purposes.¹⁵³ As mentioned, Principle 12 of the Rio Declaration, in spite of being adopted by consensus, as shown above, still sparked the US's statement of reservation. Nevertheless, in other ways, this statement is also indicative of its willingness to modify the policy of unilateralism to the extent that the ETMs should be "subject to certain disciplines."¹⁵⁴

Afterwards, the US Clinton administration began to review and adjust its policy in order to alleviate the adverse impact caused by the unilateral measure, such as

¹⁴⁸ The Basel Convention on Transboundary Movements of Hazardous Waste, 22 Mar. 1989, in force 24 May 1992.

¹⁴⁹ Montreal Protocol on Substances That Deplete the Ozone Layer, 16 Sept. 1987, in force, 1 Jan. 1991.

¹⁵⁰ EC Document, at 4.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Kingsbury, "Tuna-Dolphin Controversy", at 19.

¹⁵⁴ *Id.*

unpredictability and arbitrariness.¹⁵⁵ As a result, in 1994, in his testimony before the Senate Subcommittee on Foreign Commerce and Tourism, Undersecretary of State for Global Affairs Timothy Wirth identified four general categories in which "the consideration of trade measures may be appropriate":¹⁵⁶

1. when trade measures are required by an international environmental treaty to which the United States is a party;
2. when the environmental effect of an activity is partially within US jurisdiction;
3. when a plant or animal species is endangered or threatened, or where a particular practice will likely cause a species to become endangered or threatened;
4. when the effectiveness of an international environmental or conservation agreement is being diminished.

Instead of merely enforcing the national environmental standards, the new policy largely demonstrates the US's intention to bring its environmental trade measures closer to international level. Undoubtedly, the first situation proves entirely consistent with the primary requirement of Principle 12 of the Rio Declaration and the EC's approach that largely justify the use of ETMs on the test of multilateral consensus. As to the second category, it should be less contentious because normally a State is allowed to enforce its law within its jurisdiction.

The third and fourth category actually drawn from its national legislation, such as the Pelly Amendment,¹⁵⁷ to a great extent, show US's persistent ambition of enforcing international standards by invoking trade measures. Certainly, it is a lofty goal to preserve endangered species and safeguard the integrity of a MEA. But, it is unclear whether such practice may win universally international support or can be deemed compatible with the relevant UNCED documents. The environmental standards it aims to enforce may be similar to that of international competent institutions. But, in practice, generally, it is US's discretion to decide the exact occurrence of an alleged violation or offense, and then may impose trade sanctions against targets it deliberately chooses.¹⁵⁸ Most importantly, as to the enforcement manner, the US's trade measures, usually, imposed in the form of coercive sanctions, are likely to contradict a MEA that prefers non-coercive means, like public persuasion

¹⁵⁵ *See id.* at 19-20.

¹⁵⁶ *See* Administration Unveils New Policy on Sanctions for Environmental Harm, 11 International Trade Reporter (BNA) No. 6, 221 (Feb. 9, 1994).

¹⁵⁷ The Pelly Amendment to the Fishermen's Protective Act, 22 U.S.C. Sec. 1978, at (a) (1) (2).

¹⁵⁸ *See* chapter one of the thesis.

or condemnation, to ensure compliance.

Overall, unlike the 1991 tuna embargo,¹⁵⁹ the new US policy not only reflects its constant national environmental policy but also tends to embrace international concerns. Notwithstanding such positive modifications, it is worth observing if the international community would accept such measures that normally fall short of adequate international supervision.

(c) The *Shrimp/Turtle* case

In 1996, pursuant to Section 609 of Public Law 101-162¹⁶⁰, the US prohibited the importation of shrimp and shrimp products from India, Malaysia, Pakistan and Thailand because their fishing technology of taking shrimp was found harmful to species of sea turtles. Like the MMPA, the law requires that the exporting countries must show that they have adopted a regulatory programme governing the incidental taking of sea turtles in the course of shrimp harvesting that is comparable to that of the US in order to access the US's market.¹⁶¹ However, unlike the previous tuna embargo launched for dolphins' protection, the sea turtles that the US aims to preserve have been listed by CITES as species threatened with extinction.¹⁶² The shrimp embargo, therefore, can be seen as an exercise of the new US policy disclosed in 1994. Also, the action demonstrates again that the US will continue the policy of using economic power to influence other nations' environmental conduct.

Under the request of those members who suffered the US's environmental trade restrictions, the dispute was referred to the new international trade regime, the WTO. Remarkably, the Panel of the WTO¹⁶³ clearly made considerable efforts to reach a more balanced verdict on the case which required to take into account environmental factors by referring to the relevant rules of international environmental law. In effect, such an approach probably may, in one way or another, appease people who have

¹⁵⁹ Clearly, the 1991 US embargo against Mexico had little connection with international concern, which is not compatible with the four categories of the Clinton administration. As observed, "The dolphins, while migratory around the Eastern Tropical Pacific, are not even partially within the US Economic Exclusive Zone (EEZ); the dolphins in question are not endangered or threatened enough to be listed by CITES; and no other international agreement on dolphin conservation has yet been negotiated." See Blank, "Environmental Trade Measures", at 105, n. 209.

¹⁶⁰ Codified at 16 USC 1537 note, amending the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* [hereinafter Section 609].

¹⁶¹ *Id.*

¹⁶² See Appendix I to CITES.

¹⁶³ See United States-Import Prohibition of Certain Shrimp and Shrimp Products, the Panel Report, 15 May 1998, WT/DS58/R [hereinafter *Shrimp* Panel Report].

been persistently accusing the trade regime of lacking sufficient environmental consideration in judging ETM disputes.¹⁶⁴

Adopting significant vision, the WTO ruling first verified the proposition that trade regime and environmental law should be mutually supported. Furthermore, from the prospect of international trade law, the Panel regarded that the US's shrimp embargo constitutes a measure conditioning access to its market for a given product on the adoption of certain conservation policies by the exporting parties.¹⁶⁵ Accordingly, US's embargo was considered to have an effect threatening the security and predictability of the multilateral trading system.¹⁶⁶ More importantly, to rebut the US's claim that the WTO should justify such measures simply imposed for achieving the lofty aim of preserving endangered species,¹⁶⁷ the Panel alternatively relied heavily on the Rio Declaration, particularly Principle 12 to sustain its reasoning against unilateral ETMs. In all, by the Panel's endeavours, Principle 12 was interpreted and applied in the following manner.

Even though the Panel noted that the significance of conserving and protecting natural resource has been explicitly specified in the WTO Preamble,¹⁶⁸ it was not persuaded that the US's unilateral actions were an ideal measure to tackle issues of a global character. Conversely, it contended that Principle 12 of the Rio Declaration primarily stressing "the need for *international cooperation* and for *avoiding unilateral measures*" was consistent with the WTO Preamble.¹⁶⁹ It pointed out that:

[t]he diversity of the environmental and development situations underlined by the Preamble can best be taken into account through *international cooperation*. The Preamble also implies that attempts to generalise standards of environmental protection would require *multilateral discussion*, especially when, as here, developing countries are involved.¹⁷⁰

Indeed, the Panel generally agreed with the US that sea turtles are a shared global resource.¹⁷¹ But, it considered that "the notion of 'shared' resource implies a

¹⁶⁴ Since the release of 1991 GATT *Tuna/Dolphin* Panel Report, the GATT/WTO has been under criticism for its decision neglecting environmental protection. See generally McDonald, "Greening GATT", at 405, n. 32; Esty, *Greening GATT*, at 52-54.

¹⁶⁵ *Shrimp* Panel Report, at paras. 7.26, 7.48.

¹⁶⁶ *Id.* at paras. 7.44, 7.45, 7.60, 7.61.

¹⁶⁷ *Id.* at para. 7.52.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* [emphasis added].

¹⁷⁰ *Id.* [emphasis added].

¹⁷¹ *Id.* at para. 7.53.

common interest in the resource concerned."¹⁷² Thus, the Panel held that "[i]t would be better addressed through the negotiation of international agreements than by measures taken by one Member. . ."¹⁷³ and that "the United States should have entered into international cooperation with the aim of developing internationally accepted conservation methods, including with the complainants."¹⁷⁴

In response to the US's doubt about whether a State is required to "seek negotiation of an international agreement instead of, or before adopting unilateral measures," the Panel stated that:

The *nature* of the measures that the United States was seeking to obtain from the exporting countries concerned and the *principles* recalled in several international environmental agreements imply that a country seeking to promote environmental concerns of such a nature *should* engage into international negotiations.¹⁷⁵

In the light of the ruling that significantly favours international cooperation, it may be inferred that the obligation of a State to negotiate "multilaterally defined criteria" or suitable agreement has to be fulfilled before a competent international regime governing the critical issue has been formed.

Ultimately, the Panel emphasised once more the primacy of multilateral efforts over unilateral measures, which has been required in the *Tuna/Dolphin* decision and Principle 12 of the Rio Declaration. In its conclusion, the Panel announced that:

General international law and international environmental law clearly *favour the use of negotiated instruments rather than unilateral measures* when addressing transboundary or global environmental problems, particularly when developing countries are concerned. Hence a negotiated solution is clearly to be preferred, both from a WTO and an international environmental law prospective.¹⁷⁶

Regarding the eventual legality of unilateral measures, like Principle 12 of the Rio Declaration, the Panel had no intention of taking a definite stand on the issue. Rather, at least for the US's shrimp embargo, it simply decided:

[o]ur findings regarding Article XX *do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate; nor do they imply*

¹⁷² *Id.* [emphasis added].

¹⁷³ *Id.*

¹⁷⁴ *Id.* The Panel also refers to Art. 5 of the 1992 Convention on Biological Diversity, which urges international cooperation to confirm its approach. *See id.*

¹⁷⁵ *Id.* at para. 7.54.

¹⁷⁶ *Id.* at para. 7.61 [emphasis added].

that, in any given case, they would be permitted. Nevertheless, in the present case, even though the situation of turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system and were applied *without any serious attempt to reach, beforehand, a negotiated solution.*¹⁷⁷

The message seems to suggest that, as far as international environmental law is concerned, the WTO ruling was inclined to condition the initial permissibility of unilateral measures on the exhaustion of pursuing a negotiated solution, especially when a competent international regime has not yet functioned. In other words, to ensure the permissibility of a unilateral measure at the first stage, an acting State has to prove that a serious attempt to reach a negotiated solution has been exhausted. But, it should be noted that the fulfillment of this test does not necessarily guarantee the eventual justification of such measures under specific legal regimes, like the WTO.

As to the current *Shrimp/Turtle* case, the Appellate Body of the WTO has reversed certain legal findings of the Panel.¹⁷⁸ Nevertheless, in line with the Panel, using almost identical language, the Appellate Body endorsed the necessity of engaging multilaterally concerted and cooperative efforts to conserve sea turtles on the ground that the transboundary character of sea turtles and a significant number of other international instruments and declarations warrant such mandate.¹⁷⁹ It is true that, apart from invoking other instruments, the Appellate Body particularly highlighted the significance of Principle 12 of the Rio Declaration in an attempt to verify its view.¹⁸⁰ Although the Appellate Body did not explicitly confirm the finding in the Panel Report regarding the permissibility of unilateral measures, such finding was not reversed by the Appellate Body. Hence, there is no ground to claim that both of them did not share the same view regarding the issue.

Overall, the implications of Principle 12 of the Rio Declaration have been greatly illuminated by the WTO's efforts. The judgements suggest that the rule is no longer a pure "policy guideline", but has become a distinguished reference which may be cited to help resolve disputes. As a result, its legal status has been significantly promoted. Moreover, the WTO jurisprudence indicates that an environmental rule,

¹⁷⁷ *Id.* [emphasis added].

¹⁷⁸ United States-Import Prohibition of Certain Shrimp and Shrimp Products, the Appellate Body Report, 12 October 1998, WT/DS58/AB/R. *See also* chapter four of the thesis.

¹⁷⁹ *Id.* at para. 168.

¹⁸⁰ *Id.*

such as Principle 12 of the Rio Declaration, which is originally advocated by trade-related regimes, is able to move forward to help solve disputes referred to the trade regime.

4 Concluding Remarks

It is clear that contemporary international environmental law has addressed unilateral measures directly mainly by concluding the UNCED documents, particularly Principle 12 of the Rio Declaration. Certainly, it is quite a new rule and will continue to evolve into maturity. Another feature underlining the principle is that its formulation was largely attributed to the effort of trade regime and other related organisations. Nevertheless, its being overwhelmingly enforced at UNCED has proved its universality.

Generally speaking, international environmental law has not yet forbidden the use of unilateral ETMs, but only calls for avoidance. Nevertheless, more importantly, the priority of multilateral efforts over unilateral actions required in Principle 12 has been explicitly and loudly announced. The ultimate legality of unilateral measures seems unlikely to be assessed thoroughly only by applying those environmental documents, even though they provide a partial solution. Practices have shown that such task may be left to respective legal regimes, such as the WTO.

The WTO decisions suggest that the non-legally binding character of Principle 12 of the Rio Declaration does not prevent it from constituting a useful tool to supplement the judgements that is required to take into account the environment protection. Hence, the Principle no longer remains a purely soft law, but has already been hardened by the relevant tribunals. Overall, the good news for unilateral measures users is that the content of the Principle does leave some room to argue the permissibility of such actions. In contrast, the bad news is that those measures may be constantly challenged by some legal regimes that choose to rely on the rule as a basis to denounce the measures.

The modern interpretation of Principle 12 shows that States are required to pursue negotiated solutions based on an international consensus before resorting to unilateral measures. It is unknown how the international regimes will respond to a situation where unilateral measures are implemented during which a competent international organisation has already operated in dealing with the critical issue. Further, it remains uncertain whether the Principle should be interpreted to oblige States not to take

measures inconsistent with the existing competent regime. Also, it is not clear whether unilateral actions following a recommendation of international environmental institutions might be considered to be consistent with Principle 12. The Pelly sanctions against Taiwan may offer an opportunity to examine the issue.

B The determination of the legality of the Pelly sanctions against Taiwan under Principle 12 of the Rio Declaration

In contrast to the *Tuna* or *Shrimp* case, the US's trade sanctions against Taiwan were implemented when an MEA, namely CITES, was governing the problem of illegal trade in endangered species of rhinoceros and tigers. On that occasion, there were two parallel mechanisms both at international and national levels functioning. By applying Principle 12 of the Rio Declaration to the current dispute, initially, it is rational to demand that CITES operation prevails over unilateral actions. In this regard, theoretically, the US should be required to honour CITES and refrain from applying measures in a manner that conflicts with the existing international regime.

Yet, as we have seen, the US's trade restrictions against Taiwan were implemented shortly after the CITES Standing Committee openly censured Taiwan and called for the prohibition of trade with Taiwan in wildlife species. It was a case that environmental trade sanctions were invoked to further observance of the CITES mandate. Hence, such a linkage between CITES and the Pelly actions indicates that the latter were not a product of strict unilateralism.

This section analyses whether the US Pelly sanctions can be justified under the Rio Principle. It becomes imperative to assess whether the Pelly sanctions following the CITES's recommendation would secure the basis of "international consensus," which, as indicated above, may warrant the use of ETM. Because such a concept has not yet been properly defined, it leaves certain room to argue its implication. Theoretically, two schools of thought could emerge in helping clarify whether the Pelly sanctions constitute an international consensus in the context of CITES's operation. Before exploring the possible approaches, it is relevant to first examine the CITES's enforcement framework in order to discover the interaction between unilateral enforcement measures and CITES.

1 CITES enforcement framework

(a) National enforcement

Like most MEAs, CITES is largely a non self-executing treaty.¹⁸¹ The implementation of the CITES provisions relies mainly on national enforcement.¹⁸² As a result, CITES requires Parties to take appropriate measures to enforce the agreement.¹⁸³ The work normally comprises the enacting and enforcement of desirable legislation. In terms of the administrative framework, parties are required to establish Management and Scientific Authorities¹⁸⁴ to govern the permit issuing. Moreover, in order to effectively deter illegal trade in endangered species, CITES also demands the inclusion of penalties against violation and confiscation of illegal specimens in national measures.¹⁸⁵ Overall, as Sand concludes, "The enactment of national laws for this purpose, and the empowerment of suitable national administrative agencies to enforce them is thus a crucial first step in 'making CITES work'."¹⁸⁶

CITES aims to set up a minimum standard with which Parties are required to comply.¹⁸⁷ Hence it does not prevent Parties from implementing stricter or additional regulations than those of CITES, which may provide further protection for species.¹⁸⁸ Regarding species included in Appendices I, II and III, it allows States to adopt stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of protected species, or the complete prohibition thereof.¹⁸⁹ Furthermore, it recognises the right of Parties to restrict or prohibit trade in species not listed in those Appendices.¹⁹⁰ On the one hand, the CITES arrangement respecting the implementation of stricter national legislation is designed to generate a more satisfactory result. On the other hand, the provisions have echoed lots of State practices since the beginning of twentieth century.¹⁹¹

¹⁸¹ Self-executing treaties may be implemented at national level directly. By contrast, non self-executing treaties cannot run nationally without the stipulation of relevant national legislation. It has been observed that most provisions of CITES are non self-executing treaties. *See generally* Birnie, "Endangered Species", at 242-43; Patel, "Endangered Species", at 167-68.

¹⁸² In particular, the treaty recognises that "States are and should be the best protectors of their own wild fauna and flora." *See* CITES Preamble.

¹⁸³ CITES, Art. VIII, para. 1.

¹⁸⁴ *Id.* Art. IX, para. 1.

¹⁸⁵ *Id.* Art. VIII, para. 1 (a) (b).

¹⁸⁶ Sand, "CITES", at 47. *See also* Wassermann, "Washington Wildlife Convention", at 366.

¹⁸⁷ Favre, *Endangered Species*, at 300.

¹⁸⁸ *Id.*

¹⁸⁹ CITES, Art. XIV, para. 1 (a).

¹⁹⁰ *Id.* para. 1 (b).

¹⁹¹ The States' practice on implementing unilateral trade ban on certain species that presumably need to be preserved *see* Charnovitz, "Free Trade", at 496-97 and accompanying notes. More radically, Venezuela and Brazil are examples of countries even prohibiting the export of almost all wildlife. *See* Fitzgerald, *Wildlife Trade*, at 323; Lyster, *Wildlife Law*, at 275.

The provisions of CITES, indicated above, permitting States to impose a trade ban on species beyond the range of CITES's categories may cast a doubt upon whether such text implies that Parties may take unilateral trade sanctions against targets that fail to comply with CITES's requirements. Birnie claims that the device may "remedy the lack of any provision in CITES for specific procedures or penalties to sanction violations of the convention by Parties or Third States."¹⁹² Charnovitz disagrees, contending that: "The purpose of this provision was to make clear that CITES did not preclude the protection of a species not on a CITES list. It was not meant to authorise unilateral or multilateral action against those who disregard treaties."¹⁹³ Accordingly, it appears far from certain whether the provision is drafted to entitle States to impose a trade ban on a product of species as a means to penalise violation. In this regard, in spite of the CITES practice that usually urges the application of this article as a basis for collective sanctions,¹⁹⁴ a careful examination of the CITES text does suggest that the provision is still insufficient to serve as a legal ground for unilateral or collective enforcement actions.

(b) Institutional supervision and enforcement

It is a general criticism that CITES's lack of a centralised enforcement mechanism contributes to its occasional inability to ensure compliance.¹⁹⁵ It has been strongly proclaimed, however, unlike certain MEAs, CITES is by no means a "sleeping treaty."¹⁹⁶ CITES creates several bodies at international level responsible for supervising the implementation of the Convention, including a Secretariat, a Conference of the Parties (COP) and certain committees.

The Secretariat is an extraordinarily active body in this institution, performing many functions. It is responsible for organising meetings of the COP. It also undertakes the task of gathering, studying and distributing information of trade in species for all parties.¹⁹⁷ The information is vital for assessing the effectiveness of CITES operation. In addition, the Secretariat plays a dynamic role in facilitating the

¹⁹² Birnie, "Endangered Species", at 244.

¹⁹³ Charnovitz, "Pelly Amendment", at 799.

¹⁹⁴ See Sand, "CITES", at 38-39.

¹⁹⁵ Southworth III, "GATT and the Environment", at 1004-5. See also Patel, "Endangered Species", at 204-5; Cheung, "Tiger and Rhinoceros", at 129. Actually, ineffective enforcement is far from a unique problem facing most MEAs due to the absence of a centralised enforcement regime. See Southworth III, *id.* at 1011; Patel, *id.* at 186.

¹⁹⁶ Lyster, *Wildlife Law*, at 277.

¹⁹⁷ CITES, Art. XII, para. 2.

implementation of the treaty. To help Parties fulfill their obligations under CITES, the Secretariat provides scientific and technical assistance to Parties.¹⁹⁸ More importantly, in exercising supervisory function, it may monitor national enforcement by reviewing the reports presented by the Parties.¹⁹⁹ If the information received convinces the Secretariat that an ineffective implementation arises, it would alert national Management Authorities to the facts of infraction so as to induce the remedial actions by the Parties.²⁰⁰ The mechanism is described as "[t]he only leverage for external compliance control".²⁰¹ In practice, the Secretariat has performed this task aggressively.²⁰²

Despite the fact that such diplomatic pressure may be legitimately applied by the Secretariat,²⁰³ institutionally, this agency is not entrusted with the authority to promote compliance by mandating a collective penalty. But, empirical experience indicates that the Secretariat has not refrained from making recommendations²⁰⁴ in a manner that calls for coercive trade sanctions against certain offences. For instance, in 1986, due to Macau's failure to control illegal trade in rhinoceros horn and African elephant ivory, the Secretariat requested that all parties ban wildlife imports from Macau.²⁰⁵ Shortly afterwards, the Secretariat instructed its members to end the embargo following Macau's enforcement of stricter regulations.²⁰⁶

In contrast to the Secretariat, which serves as so-called "institutional continuity,"²⁰⁷ the COP is convened on a regular basis. Although, normally, the meeting is held biennially,²⁰⁸ Lyster stresses the significance of a regular meeting for the effectiveness of the MEA by contending that "[s]imply by requiring its Parties to meet regularly to review its implementation, a treaty can ensure that it stays at the

¹⁹⁸ *Id.* para. 2 (c). For instance, personnel training and seminars have been exercised under the auspice of the Secretariat.

¹⁹⁹ *Id.* para. 2 (d). Parties are required to submit periodic reports on their implementation of CITES. The content includes an annual report and a biennial report. The detail *see* article VIII, para. 7 (a), (b). Reporting requirement is one of the most frequently used supervisory techniques in the majority of MEAs, such as 1974 Paris Convention, the Basel Convention, etc. *See* Birnie and Boyle, *International Law and Environment*, at 166-67.

²⁰⁰ CITES, art. XIII.

²⁰¹ Sand, "CITES", at 49.

²⁰² *See* Lyster, *Wildlife Law*, at 271.

²⁰³ The Secretariat's lobbying ability on seeking compliance *see* Hill, "Endangered Specie", at 273-74.

²⁰⁴ Under Art. XII, para. 2 (h), the Secretariat may make recommendations for the implementation of the aims and provisions of the present Convention, . . .

²⁰⁵ *See* McFadden, "Asian Compliance", at 324.

²⁰⁶ *Id.*

²⁰⁷ *See* Birnie and Boyle, *International Law and Environment*, at 165.

²⁰⁸ CITES, Art. XI. As of 1997, ten COPs have been held.

forefront of its Parties' attention."²⁰⁹

Indeed, the COP is a decision-making institution in CITES. As circumstances change over the level of endangerment for certain species, the COP is entitled to adopt amendments to those Appendices by adding, removing, downlisting or uplisting species in the lists.²¹⁰ It is also responsible for supervising national enforcement by reviewing and considering any reports submitted by the Secretariat or any Party.²¹¹ Moreover, as the COP may make recommendations for improving the effectiveness of the Convention, coercive measures have ever been recommended. For instance, in response to Bolivia's persistent failure to control the re-export of wildlife taken illegally in other countries, the Fifth CITES COP held at Buenos Aires in 1985 resolved to proscribe all wildlife shipments from Bolivia within ninety days unless Bolivia began to observe CITES's obligation.²¹² But, it should be noted that the COP's recommendations of coercive measures are generally considered legally non-binding.²¹³ In practice, based on this conviction, some countries rejected compliance with the COP's resolutions.²¹⁴

Since CITES came into force, it had been complained that a meeting of the COP held every two years for the length of only two weeks is insufficient to deal with the complex issues facing CITES.²¹⁵ Hence CITES has established a number of committees to supplement the functions of the COP between ordinary meetings of the Parties.²¹⁶ Unlike other CITES committees with considerable technical functions, the tasks of the Standing Committee are largely administrative.²¹⁷ Its membership comprises six regional representatives²¹⁸ elected by the COP, plus the Depositary Government (Switzerland), the past host Party and the next host Party.

Undoubtedly, the Standing Committee is another prime agency supervising the

²⁰⁹ Lyster, *Wildlife Law*, at 12.

²¹⁰ CITES, Art. XI, para. 3 (b).

²¹¹ *Id.* Art. XI, para. 3 (d).

²¹² CITES Conf. Res. 5.2 (1985). Later, in November 1985, the Standing Committee recommended the suspension of the embargo. CITES Secretariat, Notification to the Parties of 17 December 1985. See also Fuller *et al.*, "Wildlife Trade", at 298-304; Fouere, "Emerging Trend", at 38.

²¹³ See generally Werksman, "Conference of Parties", at 55-68; Sand, "CITES", at 35 and n. 41; Crawford, "CITES", at 565.

²¹⁴ See Sand, *id.* n. 41.

²¹⁵ Favre, *Endangered Species*, at 275.

²¹⁶ These committees include the Standing Committee, the Animals Committee, the Plants Committee, the Identification Manual Committee and the Nomenclature Committee. See CITES Conf. 6.1, Establishment of Committees and Annex 1.

²¹⁷ Lyster, *Wildlife Law*, at 274-75; Favre, *Endangered Species*, at 275, 278, 279, 406-8.

²¹⁸ The six major geographic regions are Africa, Asia, Europe, North America, South and Central America and the Caribbean and Oceania. Conf. 6.1, Annex 1.

implementation of the treaty mainly through the close oversight of the Secretariat,²¹⁹ especially when the COP is unable to function continuously. Therefore, Lyster depicts the Committee as the "Inner Cabinet" of CITES.²²⁰ While the COP is entitled to make provision to help the Secretariat carry out its duties,²²¹ the Standing Committee representing the Parties between meetings of the COP shall provide general policy and general operational direction to the Secretariat concerning the implementation of the Convention.²²² Moreover, the Standing Committee also may assist the Secretariat to fulfill its functions by delivering advice and guidance.²²³ In particular, on behalf of the COP, it carries out interim activities as may be necessary.²²⁴

Regarding the infraction of the treaty obligation, recent practices indicate that the Standing Committee has been actively involved in enforcing the treaty by urging wildlife trade embargo against violators. In most cases, such enforcement actions actually proceeded in collaboration with the operation of the Secretariat.²²⁵ For instance, after receiving the report of the Secretariat concerning Thailand's lack of adequate domestic legislation to implement CITES, on 22 April 1991, the Standing Committee recommended that all wildlife trade with Thailand be banned.²²⁶ Similarly, Italy's failure to fulfill its obligation under CITES triggered a resolution of the Standing Committee calling for adoption of stricter measures against it.²²⁷ But, in this case, Austria, Switzerland and the United States declined to implement this recommendation.²²⁸ More recently, as indicated above, pertaining to the endangered species of rhinos and tiger, the Standing Committee also urged the prohibition of wildlife trade mainly against some consuming nations that were blamed for insufficient implementation. Yet, the US was the only State that implemented the

²¹⁹ See Lyster, *Wildlife Law*, at 275.

²²⁰ *Id.* at 274-75.

²²¹ CITES, Art. XI, para. 3 (a).

²²² CITES, Conf. 6.1, Annex 1.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Birnie, "Endangered Species", at 258; Favre, "CITES", at 911.

²²⁶ See CITES Secretariat Notification No. 636 (22 April 1991). After the Standing Committee's reviewing the adoption of new legislation by Thailand, on April 2 1992, a recommendation was made by the Secretariat that the trade ban be lifted. See CITES Secretariat Notification No. 673.

²²⁷ See CITES Secretariat Notification No. 675 (30 June 1992). As Italy improved its implementation of CITES, the Standing Committee reversed its recommendation. See CITES Secretariat Notification No. 722 (19 February 1993).

²²⁸ See Sand, "CITES", at n. 57.

CITES recommendation against Taiwan.²²⁹

It is clear that the absence of an effective and centralised enforcement mechanism within CITES does not prevent it from recommending coercive trade measures to remedy infraction. Such practice reflects that these CITES bodies are inclined to play a quasi-judicial role in detecting the offence and proposing a penalty, even if this operation lacks an institutional basis. In short, regardless of potential effectiveness, it should be noted, however, that this sort of enforcement method appears to fall short of binding effect and is subject to inconsistent and sporadic implementation of resolutions. Further, the proposition of using trade sanctions, in one way or another, perhaps may be deemed as a departure from the principal mandate of CITES, which largely requires international cooperation.²³⁰

On rhinos and tigers case, whether the recommendation of urging trade embargo against Taiwan may provide a solid legal basis for individual sanctions, therefore, remains highly contentious. The following presents two possible approaches with respect to the consistency between the Pelly sanctions on Taiwan and Principle 12 of the Rio Declaration.

2 Possible approaches

(a) The strict interpretation of international consensus

Not surprisingly, Taiwan may favour a cautious approach toward the application of the requirement of "measures under international consensus." In a sense, the term should be confined to an enforcement action following a binding decision of a MEA regarding the use of coercive enforcement measures, including trade sanctions. In other words, individual sanctions against violators may not be justified unless they are launched pursuant to a binding and legitimate decision of a competent institution of a MEA. Taiwan may highlight the following rationale to bolster this view.

First of all, unlike other non-coercive environmental measures,²³¹ the use of trade sanctions, by nature, is a coercive and punitive method to force compliance. Taiwan may argue that such an enforcement mechanism serving to judge national conduct should operate under a relatively attentive regulation rather than a loose, soft-law

²²⁹ Crawford, "CITES", at 565. *See also* chapter one of the thesis.

²³⁰ *See* CITES Preamble.

²³¹ Esty lists several measures aimed to affect environmental behaviour, which include trade sanctions, import restrictions, tax measures, labeling requirements, diplomatic warnings, informal consultations, educational programs, technology transfer and financial assistance. *See* Esty, *Greening GATT*, at 132.

recommendation. Accordingly, international consensus regarding environmental sanctions would require that such a measure be taken pursuant to the decision of a competent body vested with explicit enforcement power, such as sanctions mechanism. Actually, the sanctions mechanism embodied in the Security Council of the United Nations has already provided a vivid example.²³²

Moreover, strict application of Principle 12 of the Rio Declaration is able to reduce controversy and promote effectiveness for environmental trade measures. Since a recommendation by a MEA calling for coercive measures is not legally binding, a nation following the resolution may still retain the option on the duration and latitude of its action. In this regard, even though the MEA subsequently resolves to lift the sanctions, an acting State may have discretion on whether the sanctions will be terminated according to its own judgement. As a result, such imposition of sanctions without effective supervision will run the risk of putting international order into chaos. Thus, not surprisingly, even writers advocating the need for coercive trade measures also concede the potential abuse caused by the unbridled individual sanctions.²³³

On the other hand, the Pelly sanctions against Taiwan should be seen as incompatible with the implications of Principle 12 of the Rio Declaration partly because of the failure of the US to seek multilateral solutions before resorting to unilateral measures. As indicated, an enforcement mechanism with sanctions power has not yet been established in the CITES regime. Inferred from the *Shrimp/Turtle* case on the elaboration of Principle 12, it may be held that the US should first have made serious attempts to propose the amendment of CITES so as to create a sanctions mechanism rather than relying on the CITES non-binding recommendation to warrant its individual action. In fact, there was no indication that the US had ever fulfilled the requirement before resorting to unilateral sanctions.

Overall, under the strict reading of Principle 12 of the Rio Declaration, the US's Pelly sanctions, even with certain linkage with a CITES recommendation, were insufficient to reach the status of an international consensus.

(b) The broad interpretation of international consensus

Alternatively, an alleged "international consensus" may be perceived from a

²³² The UN Charter, Art. 39 and 41.

²³³ Southworth III, "GATT and Environment", at 1011.

different perspective. The principle might be interpreted to be as flexible as possible to justify an action recommended by MEAs, even though the MEA's resolution is subject to non-binding nature.

First of all, as far as the wording of Principle 12 is concerned, it may be pointed out that no convincing evidence upholds that measures based on "international consensus" must be confined to those officially authorised by MEAs. Thus, Blank contends that "[P]rinciple 12 does not require a binding agreement, only a level of international consensus."²³⁴ As a result, the use of trade sanctions, even without explicit authorisation by MEAs, may secure certain sorts of the status of international consensus.

Secondly, the effort to circumscribe measures of international consensus to those trade sanctions well-authorised in MEAs, so far, may be unrealistic. Ideally, the development of strong and effective enforcement mechanisms is a better and more accountable solution to cope with non-compliance.²³⁵ But, the hurdle of formulating an enforcement regime embodying the sanctions prerogative in most MEAs remains.²³⁶ Therefore, it may be upheld that the "advice" of MEAs,²³⁷ even without binding force, should be enough to exonerate unilateral trade sanctions simply aiming to enforce such a recommendation.

Furthermore, certain implementation of environmental sanctions, although imposed unilaterally, is not a pure form of unilateralism but carries many features of multilateralism. Esty articulates the term "multilateral unilateralism" in describing this category of environmental measures.²³⁸ The circumstances, he proposes, include unilateral actions employed in support of internationally agreed standards as well as those measures invoked in response to global or transboundary environmental harms.²³⁹ He further points out that multilateral unilateralism should be guaranteed especially if multilateral efforts do not succeed.²⁴⁰ Hence, unilateral trade measures shall be permissible if taken within a "multilateral legal structure."²⁴¹ Therefore, in

²³⁴ Blank, "Environmental Trade Measures", at 98.

²³⁵ See Jenkins, "Trade Sanctions", at 225-26.. It also has been observed that the effective operation of a collective enforcement mechanism may reduce the necessity of invoking unilateral actions to deal with international environmental problems. See *id.*

²³⁶ See generally Esty, *Greening GATT*, at 144, 150; see also Jenkins, "Trade Sanctions", at 227; Blank, "Environmental Trade Measures", at 98.

²³⁷ Jenkins, *id.* at 227.

²³⁸ See Esty, *Greening GATT*, at 140-41.

²³⁹ *Id.* at 139.

²⁴⁰ *Id.* at 150.

²⁴¹ *Id.* at 141.

Esty's view, the Pelly practice mainly aimed at forcing Taiwan to comply with CITES's mandate offers an example of multilateral unilateralism.²⁴²

In sum, in the light of the above contention, the flexible interpretation of an international consensus may allow unilateral measures that have genuine connection with multilateral legal structure to be permissible under the Rio Principle.

Nevertheless, even if a non-binding recommendation of an MEA may secure the status of an alleged international consensus, in Taiwan's case, it merits examination whether the US's trade sanctions against Taiwan were really based on such "international consensus". Taiwan could not dispute the text of the decision at the 30th meeting of the Standing Committee, which urged parties to consider banning wildlife products from Taiwan and China. But, Taiwan could point out that, in contrast to the previous meeting, no clear recommendation on a trade embargo against Taiwan has been made at the 31st meeting of the Standing Committee. Rather, Taiwan was required to demonstrate clear progress before the next meeting of CITES COP. Therefore, the US's action, Taiwan may argue, deliberately ignored the more recent CITES's decision and only followed the old one. It should therefore not be regarded as being supported by international consensus.

By contrast, the US may contend that, at its 31st meeting, the Standing Committee did not withdraw its previous recommendation (30th meeting, September 1993) urging nations to consider prohibiting trade in wildlife ~~specimens~~ with Taiwan and China.²⁴³ Therefore, the previous recommendation would remain valid and still operative. Also, it may contend that COP Resolution (CONF. 6.10) has not been revoked. It recommended the parties to "use all appropriate means (including economic, political and diplomatic) to exert pressure on countries continuing to allow trade in rhinoceros horn." In addition, the US may point out that CITES seemed not ready to express its opposition to such sanctions, because the US action was reported by the Secretariat to the 1994 COP with no trace of criticism.²⁴⁴ It may also stress that the use of trade sanctions might well have been considered as the very factor which might ensure that "further clear progress" would be achieved by the next

²⁴² *Id.* at 150-51.

²⁴³ Crawford, "Rhinoceros and Tiger", at 565.

²⁴⁴ The Ninth Conference of the Parties, Report of the Secretariat, Interpretation and Implementation of the Convention: Trade in Rhinoceros Specimens, Doc. 9.28, at 4 (1994).

COP.²⁴⁵ Further, due to the fact that Taiwan was the only country that was blamed for falling short of meeting the CITES's minimum requirements, the US could argue that its action, which was designed to enforce observance with CITES standards, was consistent with the spirit of international consensus.

A prudent tribunal is perhaps expected to evaluate the overall decisions made by the CITES Standing Committee in deciding whether the Pelly sanctions were compatible with the Rio principle. It must detect the real implications embodied in those recommendations regarding the enforcement actions against Taiwan. If it assumes that CITES may, in one way or the other, tolerate the US's individual actions and appreciate the result brought by the sanctions. It probably may favour the US's position. Otherwise, it might pay sympathy to Taiwan's contention, adopting a rigid interpretation of the CITES decisions.

²⁴⁵ The Decisions of the Standing Committee on Trade in Rhinoceros Horn and tiger Specimens, Geneva, Mar. 1994, at para. 8.

Conclusion

The practice of the US Pelly sanctions against Taiwan was an indication of the US's tendency to bring its national law to bear on international concerns. Under the guise of enforcing a MEA, a Pelly sanction's association with the multilateral approach of CITES may, to some degree, appease, though not totally eliminate, the critic on the US's deliberate use of trade measures. Nonetheless, the fact that such Pelly sanctions are likely to run, in most cases, without proper supervisory control by multilateral mechanisms will repeatedly arouse scepticism about their legality.

Indeed, the US Pelly action against Taiwan creates a difficult task for the international community to decide whether it was legally permissible, particularly under the context of the Rio Declaration. The eventual determination on the Pelly sanctions' consistency with Principle 12 depends on the interpretation and application of the term "measures based on international consensus." Since relevant practices and decisions concerning the implication of the term have not yet been fully shaped, this will inevitably leave some room to argue its real meaning.

If the worry about the abuse of unilateral economic means prevails, a conservative stand may be adopted to reject the consistency of the Pelly sanctions with Principle 12, despite the former's certain linkage with a MEA. By contrast, if the value brought by unilateral measures to the advance of international environmental protection is significantly appreciated, it could not be ruled out that the Pelly sanctions may have secured the end sought by Principle 12.

On the other hand, it should be noted that the Pelly Amendment is not required to be limited to the operation of MEAs. In effect, its response to the global species' degradation may turn out not necessarily to be linked to the verification of any international agreements. Accordingly, the use of Pelly sanctions might be challenged continuously as long as the unilateral nature of measures is retained.

Conclusion

"Let he who is without sin cast the first stone."

John 8:7

The sovereign right of a State to regulate its own commercial transactions continues to be firmly rooted in international law. Nevertheless, the prerogative of a nation to select its trading partners remains subject to certain constraints enunciated in international customary law, treaty and even soft law, largely because the implementation of a trade embargo with a specific purpose may run the risk of infringing international law. It may infringe general principles, such as rules relating to countermeasures, or to non-intervention. It may also infringe rules deriving from special regimes, such as international trade law or international environmental law.

As to the preservation of the international environment, it is admitted that trade sanctions can be a useful tool in promoting environmental awareness, and, occasionally in effecting actual environmental change. Their effectiveness, however, appears to be unpredictable and subject to various circumstances. Consequently, it is not competent to justify unilateral enforcement action by reference to the valuable result brought by the action, as in the case of the US's Pelly sanctions.

It is believed that this study has provided some useful references in assessing the legality of imposing trade measures for environmental purposes. It is always essential to seek out the relevant facts of the dispute before looking at the crucial issue of lawfulness. Likewise, in determining the lawfulness of the US Pelly sanctions against Taiwan, some empirical evidence has been presented to indicate that their legality could not be fully assessed merely by reviewing the text of the Pelly Amendment alone. Rather, the task hinges on the evaluation of all the relevant facts surrounding the actions.

Having disclosed the relevant facts surrounding the use of the Pelly sanctions and explored the applicable norms on this dispute, we may conclude the issue of the legality of the Pelly sanctions against Taiwan as follows:

Firstly, concerning the regime of countermeasures, a prior violation of international law by an alleged offending State is a prerequisite for justifying unilateral enforcement actions. But, even where a breach of international environmental law does occur, it is necessary to explore further whether the breached norm constitutes an enforceable law. It has been demonstrated that, under the present jurisprudence, not all of environmental offences can be enforced by a State

that actually suffers no direct damage.

Particularly, in relation to international wildlife law on species protection, it is far from certain whether the norm has become an enforceable law. This is principally because the concept of 'collective interests' in the ILC draft article on State responsibility remains unsettled, as does the *erga omnes* doctrine over such environmental obligations. In the Taiwan's case, it is not clear whether the Pelly sanctions can be considered to be a legal countermeasure, mainly due to the uncertainty regarding the violation of customary international law by Taiwan's rhinos and tiger conservation policy.

Secondly, regarding non-intervention doctrine, the *Nicaragua* case established that the law on non-intervention should be interpreted to prevent the imposition of economic embargoes by economically powerful States against relatively weak ones, whereby they amount to the coercive overpowering of the target State's sovereignty. The ICJ held, probably correctly, that the American sanctions against Nicaragua did not violate customary law of non-intervention. But, the decision does not necessarily imply that any use of economic measures would not constitute illegal intervention under any circumstances. In the case of the Pelly sanctions against Taiwan, it is submitted that the crucial element of coercion was present. The basis of this conclusion is the unique character of the overall relations between the US and Taiwan. In sum, if a tribunal only focuses on the material economic loss inflicted on Taiwan as a primary base for such a judgement, it may not consider the Pelly sanctions to be coercive. It is submitted, however, that the matter should be considered not only on narrowly economic grounds but also on the basis of the overall relations between the two countries. When considered in this broader framework, the coercive character of the Pelly sanctions in the Taiwan case becomes apparent.

Thirdly, the specific regime of international trade law is also highly relevant to any assessment of the legality of unilateral economic sanctions. This body of law stresses the principle of non-discrimination and of the prohibition against quantitative restrictions on trade (such as a trade embargo). The discussion has proceeded on the basis of the norms of the GATT/WTO and of the FCN treaties which are most relevant to the study.

Inferred from the Tuna and the Shrimp decisions, it is clear that the WTO has showed a broad tolerance towards PPM measures. But, it has also set out certain limitations to curb the abuse of the measure. Therefore, it seems too soon to predict that the WTO may embrace environmental trade sanctions in the short term. Because Taiwan is not a member of the WTO, the US did not violate the GATT/WTO rules in imposing the Pelly sanctions. But, our hypothetical study shows that the enforcement action would have breached the WTO/GATT rules, had it been a member.

The Pelly sanctions against Taiwan arguably violated the MFN provision and the prohibition against quantitative restrictions. The strict interpretation on the 'necessity' requirement adopted by the WTO tribunal probably means that most use of trade sanctions would be deemed inconsistent with exceptional clause (b) in Article XX of GATT 1994 concerning living species protection. Such trade measures, however, have a better chance of meeting the requirement of paragraph (g) dealing with preservation of natural resources. For instance, the catalogue of living species, either land-based species or transboundary marine species, may be treated differently in the GATT's environmental exceptional clause. A trade measure invoked to protect marine species, thus, has a better chance to survive the exception (g). Nevertheless, in Taiwan's case, the absence of a close and real connection between the unrelated products targeted by the Pelly sanctions, such as bird feather, and the policy goal which was to preserve rhinos and tigers is the main reason that the action could not satisfy Article XX (g).

Even if a trade sanction, like the Pelly action, could fall within the range of these exceptional clauses, it still has to stand the test of the chapeau's mandate, which is usually interpreted more narrowly. It is true that the Pelly sanctions against Taiwan were imposed in the wake of a decision by the CITES Standing Committee. Thus, the US had, perhaps, a better chance to convince the WTO that the Pelly sanctions were not imposed in a manner which constituted unjustifiable discrimination. It should be noted, however, that the decision made by the Standing Committee on Taiwan was reached without any substantial opportunity on Taiwan's part to put its case fully to the CITES parties. Thus, it remains possible that the WTO tribunal would hold the US's Pelly action to have been discriminatory notwithstanding the CITES Committee decision. In addition, under the present WTO jurisprudence, the sanctions would be seen as arbitrary discrimination due to the lack of due process of law in the implementation of the Pelly Amendment.

It is indisputable that the FCN treaty between the US and the ROC (Taiwan) is the most feasible regime under which Taiwan may seek a proper remedy. Like the GATT rules, the FCN treaty allows trade restrictions for the protection of animal life—but subject to the crucial requirement that any such measures may not constitute 'arbitrary discrimination' (Article 26 (2)(b)). The sanctions may presumably survive the test of the environmental exceptional clause provided in the treaty. But, the US would have substantially the same difficulty in establishing that its action was not arbitrary discrimination as it would under the WTO norms.

Finally, contemporary international environmental law requires international consensus to be sought before resorting to unilateral measures. This is a soft-law requirement embodied in Principle 12 of the Rio Declaration. However, it fails to

clarify whether or not, or under what circumstances, the unilateral action may be prohibited or justified. Rather, the principle, at face value, merely makes a policy direction, requesting the "avoidance" of unilateral action. In fact, Principle 12 was not drafted with the intention to decide the legality of unilateral enforcement measures for environmental purposes, but rather to reaffirm the priority of seeking international cooperation and negotiation, which has become a principal mandate of international environmental law. Interestingly, however, the principle has been hardened by the decision of an international tribunal, like the WTO, to the extent that it seems to be an obligation of States to pursue concerted action by, *inter alia*, concluding bilateral, regional or multilateral agreements before engaging in unilateral action.

On the issue of the Pelly sanctions against Taiwan, whether the trade embargo acts purely unilaterally or in conjunction with international regime, such as CITES will, to some extent, affect the determination as to its consistency with Principle 12. It is true that such measure is not a pure product of unilateralism due to the connection between the action and CITES's recommendation. But, it remains uncertain whether such connection may be sufficient to guarantee the international consensus required in the principle.

In the light of the above observation, under certain circumstances, the legality of the Pelly sanctions against Taiwan is quite uncertain, partly because some applicable rules have not yet matured and no relevant precedent has been established.

The study shows that, to some extent, the assessment on the lawfulness of an individual action authorised by the Pelly Amendment cannot be properly concluded without carefully examining various factors involved in the action. As a result, the task might vary according to different circumstances. Accordingly, the legitimacy of a Pelly sanction would be determined on a case by case basis. Overall, this study cannot be said to conclude that the imposition of a Pelly sanction would be unlawful under any circumstances. It can only be concluded that their legality is questionable in the specific case of application to Taiwan, given the particular circumstances.

On the other hand, it should be noted that this presumed conclusion—that the US Pelly sanctions against Taiwan breached certain rules of international law—should not obscure the significance and necessity of protecting endangered species, which is definitely a critical issue facing the international community. It seems possible that the greater the consensus in favour of a legal duty of preserving species, the stronger the argument in favour of the permissibility of Pelly-type environmental sanctions.

Nevertheless, at the present stage, the more ideal solution perhaps is to formulate an accountable regime to address the compliance with international environmental standards. It has been observed that the result of urging the WTO to accept certain types of unilateral environmental measures seems not always to be desirable, even

though the institution has recently shown its willingness to embrace international environmental norms.¹ Further, it is doubtful whether the WTO is a suitable regime for shouldering the task in determining the permissibility of environmental trade measures. It seems that the enforcement action undertaken by the CITES Standing Committee in recommending wildlife trade embargo is not always effective and does not necessarily lead to a satisfactory outcome partly due to the non-binding character of its recommendation and to the absence of an institutional sanction mechanism. Thus, in all events, the best solution is to forge a strong multilateral enforcement mechanism with institutional sanctions power. An alternative solution recommended by some commentators is to create an international environmental organisation,² analogous to the WTO, which may effectively supervise individual actions and solve disputes triggered by the measures. Overall, it is believed that, as effective multilateral enforcement instruments improve in effectiveness, the tolerance of unilateral action by the international community will accordingly diminish.

¹ See generally Dunoff, "Border Patrol", at 27.

² Some author proposes the establishment of a "Global Environment Organisation". See Esty, *Greening GATT*, at 78-98. See also Charnovitz, "Harmonisation", at 283-85; Ayling, "International Environmental Organisation", at 243-69.

Appendix A

Text of the Pelly Amendment to the Fishermen's Protective Act

(United States)

22 USC Sec. 1978

TITLE 22 - FOREIGN RELATIONS AND INTERCOURSE

CHAPTER 25 - PROTECTION OF VESSELS ON THE HIGH SEAS AND IN TERRITORIAL WATERS OF FOREIGN COUNTRIES

Sec. 1978. Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs.

(a) Certification to President

(1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

(3) In administering this subsection, the Secretary of Commerce or the Secretary of the Interior, as appropriate, shall -

(A) periodically monitor the activities of foreign nationals that may affect the international programs referred to in paragraphs (1) and (2);

(B) promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification under paragraph (1) or (2); and

(C) promptly conclude; and reach a decision with respect to; any investigation commenced under subparagraph (B).

(4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

(b) Notification to Congress

Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefor.

(c) Importation of fish products from offending country prohibited

It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any products prohibited by the Secretary of the Treasury pursuant to this section.

(d) Periodic review by Secretary of Commerce or Secretary of the Interior; termination of certification; notice

After making a certification to the President under subsection (a) of this section, the Secretary of Commerce or the Secretary of the Interior, as the case may be, shall periodically review the activities of the nationals of the offending country to determine if the reasons for which the certification was made no longer prevail. Upon determining that such reasons no longer prevail, the Secretary concerned shall terminate the certification and publish notice thereof, together with a statement of the facts on which such determination is based, in the Federal Register.

(e) Penalties; forfeiture; customs laws

(1) Any person violating the provisions of this section shall be fined not more than \$10,000 for the first violation, and not more than \$25,000 for each subsequent violation.

(2) All products brought or imported into the United States in violation of this section, or the monetary value thereof, may be forfeited.

(3) All provisions of law relating to the seizure, judicial forfeiture, and condemnation of a cargo for violation of the customs laws, the disposition of

such cargo or the proceeds from the sale thereof, and the remission or mitigation of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as such provisions of law are applicable and not inconsistent with this section.

(f) Enforcement

- (1) Enforcement of the provisions of this section prohibiting the bringing or importation of products into the United States shall be the responsibility of the Secretary of the Treasury.
- (2) The judges of the United States district courts, and United States magistrate judges may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this chapter and regulations issued thereunder.
- (3) Any person authorized to carry out enforcement activities hereunder shall have the power to execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this section.
- (4) Such person so authorized shall have the power -
 - (A) with or without a warrant or other process, to arrest any persons subject to the jurisdiction of the United States committing in his presence or view a violation of this section or the regulations issued thereunder;
 - (B) with or without a warrant or other process, to search any vessel or other conveyance subject to the jurisdiction of the United States, and, if as a result of such search he has reasonable cause to believe that such vessel or other conveyance or any person on board is engaging in operations in violation of this section or the regulations issued thereunder, then to arrest such person.
- (5) Such person so authorized, may seize, whenever and wherever lawfully found, all products brought or imported into the United States in violation of this section or the regulations issued thereunder. Products so seized may be disposed of pursuant to the order of a court of competent jurisdiction, or, if perishable, in a manner prescribed by regulations promulgated by the Secretary of the Treasury after consultation with the Secretary of Health and Human Services.

(g) Regulations

The Secretary of the Treasury, the Secretary of Commerce, and the Secretary of the Interior are each authorized to prescribe such regulations as he determines necessary to carry out the provisions of this section.

(h) Definitions

As used in this section -

(1) The term "person" means any individual, partnership, corporation, or association.

(2) The term "United States" means the several States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the Virgin Islands, and every other territory and possession of the United States.

(3) The term "international fishery conservation program" means any ban, restriction, regulation, or other measure in effect pursuant to a bilateral or multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea, including marine mammals.

(4) The term "international program for endangered or threatened species" means any ban, restriction, regulation, or other measure in effect. p Subsec. (f). Pub. L. 95-376, Sec. 2(6), inserted references to the Secretary of Commerce and the Secretary of the Interior. Subsec. (g)(3). Pub. L. 95-376, Sec. 2(7)(A), (B), substituted "in effect" for "in force", and "which is in force with respect to the United States" for "to which the United States is a signatory party". Subsec. (g)(5) to (7). Pub. L. 95-376, Sec. 2(7)(C), added pars. (5) to (7).

Change of Name

"United States magistrate judges" substituted for "United States magistrates" in subsec. (f)(2) pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure. Previously "United States magistrates" substituted for "United States commissioners" pursuant to Pub. L. 90-578. See chapter 43 (Sec. 631 et seq.) of Title 28. "Secretary of Health and Human Services" substituted for "Secretary of Health, Education, and Welfare" in subsec. (f)(5) pursuant to section 509(b) of Pub. L. 96-88, which is classified to section 3508(b) of Title 20, Education.

Section Referred to in Other Sections

This section is referred to in title 16 sections 1371, 1821, 1826, 1826a, 4242.

Appendix B

Table 1

The Episode of the Implementation of the Pelly Amendment

Date of certification	Species to be preserved	Target	Sanctions to be imposed
1974	Whale	Japan, Soviet Union	No
1978	Whale	Chile, Peru, and South Korea	No
1985	Whale	Soviet Union	No
1986	Whale	Norway	No
1988	Whale	Japan	No
1989	Driftnet Fishing	Taiwan	No
1989	Driftnet Fishing	South Korea	No
1990	Whale	Norway	No
1991	Sea Turtles	Japan	No
1991	Driftnet Fishing	South Korea	No
1991	Driftnet Fishing	Taiwan	No
1992	Whale	Norway	No
1993	Whale	Norway	No
1993	Rhinos and Tiger	China and Taiwan	China: No Taiwan: Yes
1995	Whale	Japan	No
1996	Whale	Canada	No
1996	Whale	Norway	No

Appendix C

Table 2

Multilateral and Unilateral's response to rhinos and tiger crisis

	CITES	The US Pelly Action
June, 1992	28 th Standing Committee: <ul style="list-style-type: none"> rhinos only education; substitute give support to countries lacking enforcement means 	
Nov., 1992		The Secretary of the Interior was brought attention by environmental groups regarding Taiwan, China, South Korea and Yemen's alleged offense
March, 1993	29 th Standing Committee: <ul style="list-style-type: none"> rhinos only reiterate COP 6.10 	
Sep., 1993	30 th Standing Committee: <ul style="list-style-type: none"> noting the progress made by certain States South Korea's entry to CITES China and Taiwan had not sufficiently comply with COP. 6.10.; recommended parties to consider using wildlife trade embargo against them. set minimum criteria to be enforced encourage international co-operation 	The Secretary of the Interior certified China and Taiwan. President Clinton decided to postponed the sanctions until next meeting of the CITES.
March, 1994	31 st Standing Committee: <ul style="list-style-type: none"> China met the basic requirement Taiwan had not implemented the criteria adequately; recommended clear progress must be demonstrated within eight month noting further actions need to be undertaken by several nations 	
April, 1994		President announced the imposition of the Pelly sanctions against Taiwan
Nov., 1994	9 th COP in US: <ul style="list-style-type: none"> no recommendation of using trade embargo against certain countries 	
June, 1995		President lifted the sanctions upon Taiwan
Sep., 1996		The Interior Secretary terminated the certification

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